

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922. 1922/

No. 5 ~~106~~ 14

**WILLIAM T. PRICE AND ORA PRICE, PLAINTIFFS IN
ERROR,**

vs.

MAGNOLIA PETROLEUM COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED AUGUST 15, 1922.

(29,096)

(29,096)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 546.

WILLIAM T. PRICE AND ORA PRICE, PLAINTIFFS IN
ERROR,

vs.

MAGNOLIA PETROLEUM COMPANY *ET AL.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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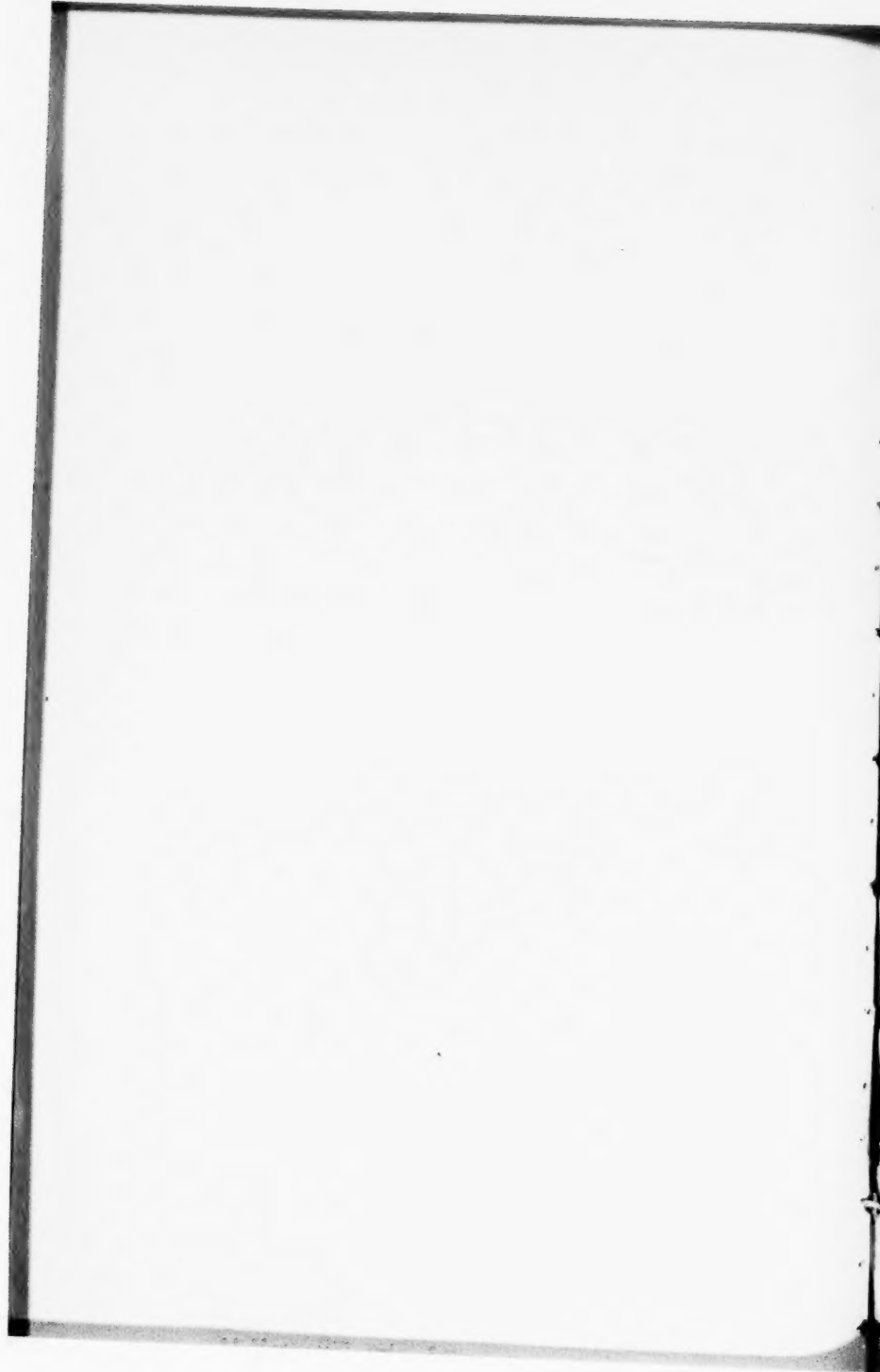
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Return to Writ.

In obedience to the commands of the within Writ, I transmit herewith to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case as called for and designated by the praecipe filed in this Court in said cause, with all things concerning the same, including the opinion of the Court, rendered, filed and recorded.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, Oklahoma, this 2nd day of August, 1922.

WILLIAM M. FRANKLIN,
Clerk of the Supreme Court of Oklahoma.

By JESSIE PARDOE, Deputy.

[Seal of the Supreme Court]

[Stamped]

Filed in Supreme Court of Oklahoma, August 2nd, 1922.

WILLIAM M. FRANKLIN, Clerk.
By JESSIE PARDOE, Deputy.

In the Supreme Court of the United States.

(Filed in Supreme Court of Oklahoma July 22, 1922,
William M. Franklin, Clerk.)

WILLIAM T. PRICE and ORA PRICE, his wife, Plaintiffs in Error,

vs.

MAGNOLIA PETROLEUM COMPANY, a joint stock association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees; STATE OF OKLAHOMA,
ex rel. Commissioners of the Land Office of the State of
Oklahoma, and *ex rel.* S. P. Freeling, Attorney General
of the State of Oklahoma, Defendants in Error.

Citation.

United States of America, to the Magnolia Petroleum Com-

pany, a joint stock association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly, and W. C. Proctor, Trustees; and the State of Oklahoma, *ex rel.* Commissioners of the Land Office of the State of Oklahoma, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, defendants in error, Greetings:

You, and each of you, are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein William T. Price and Ora Price are plaintiffs in error, and you, the Magnolia Petroleum Company, a joint stock association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly, and W. C. Proctor, Trustees; and the State of Oklahoma, *ex rel.* Commissioners of the Land Office of the State of Oklahoma, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error (appellants) as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this the 21st day of July, in the year of our Lord, 1922.

WILLIAM H. TAFT,

~~Acting~~ Chief Justice of the Supreme Court of the United States.

By JOHN H. PITCHFORD,

Acting Chief Justice of the Supreme Court of Oklahoma.

Attest:

WM. M. FRANKLIN, Clerk, Supreme Court of Oklahoma.

By JESSIE PARDOE, Deputy Clerk.

[SEAL]

Copy of the above and foregoing citation received, and service acknowledged on this 21st day of July, A. D. 1922, at the office of the Attorney General of the State of Oklahoma, and each of said defendants in error (appellees) hereby enters

its and his general appearance in said cause in the Supreme Court of the United States.

J. B. A. ROBERTSON, *Governor,
State of Oklahoma, ex rel. Commissioners
of the Land Office of the State of Okla-
homa, and ex rel. S. P. Freeling, Attorney
General of the State of Oklahoma.*

GEO. F. SHORT,
Attorney General for Oklahoma.

By C. W. KING,
Assistant Attorney General.

By GEO. E. MERRITT,
*Attorney for Commissioners of the Land
Office of the State of Oklahoma.*

Copy of the above and foregoing citation received, and service acknowledged on this 22nd day of July, A. D. 1922, at the office of the Magnolia Petroleum Company, and each of said defendants in error (appellees) hereby enters its and his general appearance in said cause in the Supreme Court of the United States.

Magnolia Petroleum Company, a joint stock association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly, and W. C. Proctor, Trustees.

B. B. BLAKENEY & HUBERT AMBRISTER,
Its and Their Attorneys of Record.

(Filed in Supreme Court of Oklahoma, July 21, 1922,
William M. Franklin, Clerk.)

The Supreme Court of the United States.

In the Supreme Court of the State of Oklahoma.

WILLIAM T. PRICE and ORA PRICE, his wife, Plaintiffs in Error,
vs.

MAGNOLIA PETROLEUM COMPANY, a joint stock association,

John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly and W. C. Proctor, Trustees; STATE OF OKLAHOMA, *ex rel.* Commissioners of the Land Office of the State of Oklahoma, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, Defendants in Error.

Petition for Writ of Error.

To the Honorable William H. Taft, ^{chief} Justice of the Supreme Court of the United States, and the Associate Justices in said Court:

Now come William T. Price and Ora Price, and would show unto this Honorable Court that in the record and proceedings and rendition of the decree of the above cause by the Supreme Court of the State of Oklahoma, it being the highest court in said State in which a decision could be had in a suit between the Magnolia Petroleum Company, a joint stock association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly, and W. C. Proctor, Trustees; and the State of Oklahoma, *ex rel.* Commissioners of the Land Office, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, were plaintiffs in error, and William T. Price and Ora Price, were defendants in error, manifest error has occurred, greatly to defendants' damage, whereby plaintiffs in error feel aggrieved.

That in the record and proceedings, it will appear that there was drawn in question the validity of the Statutes of the State of Oklahoma, passed and approved the 26th day of May, 1908, appearing in the Session Laws of the State of Oklahoma of 1907-08, Chapter 49, Article IV, page 490.

That in the above entitled matter, on the 21st day of April, 1922, judgment was rendered against your petitioners by the Supreme Court of the State of Oklahoma, and application for re-hearing thereof was denied by the said court on the 2nd day of May, 1922; that being the highest court of law or equity in the said State of Oklahoma, in which a decision could be had on the said question, and in the said case.

That in said judgment and final order, and in the proceedings in said cause, certain errors were committed to the preju-

dice of petitioners, all of which will, more in detail, appear from the Assignment of Errors which is filed with this petition.

That in the above entitled matter in said Court, it was adjudged that the provisions of the Statute of the State of Oklahoma of 1907-08, Chapter 49, Article IV, which made it lawful for the Commissioners of the Land Office of the State of Oklahoma, when any tract of the "lands granted to the State under the Act of Congress known as the Enabling Act, is, by the Commissioners of the Land Office of the State, known to contain oil or gas, or where such lands are, by such Commissioners, deemed valuable for oil and gas purposes, that such Commissioners shall enter of record in their office their finding declaring such oil or gas character exists, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this act," to lease the oil and gas interest in said land so segregated "for oil and gas purposes to the same extent and in the same manner as private owner in fee could," was not in conflict with the terms and provisions of the Act of Congress of June 16, 1906 (Enabling Act), and not in conflict with the terms and provisions of, and repugnant to, the Constitution of the United States, Section 1, Article 10, and the XIV Amendment thereto, as to petitioners, who then and there held a tract of said land and possessed and claimed said tract of land by having initiated their rights as lessees thereof under the said Enabling Act and who continuously held and claimed a preference right to purchase said land under the said Enabling Act, and who hold and claim to have acquired and purchased the said land under the Enabling Act and by compliance with the Statute of Oklahoma of 1909, Chapter 28, Article II; in that the provisions of said Statute did not impair petitioners' right of contract as to said land, and did not deprive petitioners of liberty and property without due process of law, and did not deny to petitioners so situated, the equal protection of the law.

That in the above entitled matter in said Court, it was adjudged that the authority of the Commissioners of the

Land Office of the State of Oklahoma, exercised under said Statute, in executing an oil and gas lease, or grant, to the Magnolia Petroleum Company, on January 4, 1919, to the land in question, was not in conflict with the terms and provisions of the Act of Congress of June 16, 1906 (Enabling Act) and not in conflict with the terms and provisions of, and repugnant to the Constitution of the United States, Section I, Article 10, and the XIV Amendment thereto, as to petitioners who then and there held said tract of land and possessed and claimed said tract of land by having initiated their rights as lessees of land under the said Act of Congress of June 16, 1906 (Enabling Act), and who continuously held and claimed a preference right to purchase said land, and all of it, under the Enabling Act, and who hold and claim to have acquired and purchased the said land under the Enabling Act and by compliance with the Statute of Oklahoma of 1909, Chapter 28, Article II, in that the authority so exercised as applied to petitioners in said land, did not impair petitioners' right of contract as to said land, and did not deprive petitioners of liberty and property without due process of law, and did not deny to petitioners so situated, the equal protection of the law.

That in the above entitled matter, in said court, it was adjudged: That the authority of the Magnolia Petroleum Company in entering upon and exploring said land, and taking therefrom oil, gas and water, under such oil and gas lease, so executed by the Commissioners of the Land Office of the State of Oklahoma, to the Magnolia Petroleum Company, on January 4, 1919, was not in conflict with the terms and provisions of the Act of Congress of June 16, 1906 (Enabling Act), and not in conflict with the terms and provisions of, and repugnant to the Constitution of the United States, Section 1, Article 10, and the XIV Amendment thereto, as to petitioners, who then and there held said tract of land and then and there claimed said tract of land by having initiated their rights as lessees thereof under the said Enabling Act and who continuously held and claimed the preference right of purchase of said land, and all of it, under the Enabling Act, and under their claim to have acquired and purchased said land under the Enabling Act and by compliance with the

Statute of Oklahoma of 1909, Chapter 28, Article III, in that the exercise of such authority by the Magnolia Petroleum Company did not impair petitioners' right of contract as to said land, and did not deprive petitioners of liberty and property without due process of law, and did not deny to petitioners so situated, the equal protection of the law.

That in the above entitled matter, it was adjudged by said Court that the Act of Congress of June 16, 1906 (Enabling Act) was invalid, and that the authority exercised thereunder by the petitioners, was invalid, in that the Court adjudged that the petitioners had no preference right to purchase the said land in its entirety that was not subject to the power of the State, or the Commissioners of the Land Office of the State of Oklahoma, to annul, limit, impair or render ineffective; as more fully appears by Assignment of Errors filed herein.

Wherefore: Your petitioners pray for the allowance of Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma, and the judges thereof, to the end that the record in said matter may be removed to the Supreme Court of the United States, and the error complained of by your petitioners may be examined, corrected and said judgment reversed, and the judgment of the District Court in said cause be affirmed, and for such further proceedings in said cause as may be determined by this Honorable Court, to the end that justice may be done in the premises; and your petitioners will ever pray.

ERNEST E. BLAKE,
JOHN F. SHARP,
C. B. STUART,
M. K. CRUCE,
A. T. BOYS,
W. C. STEVENS,

Attorneys for Plaintiffs in Error.

Assignments of Error.

(See page 204.)

Supreme Court of the United States.

In the Supreme Court of the State of Oklahoma.

WILLIAM T. PRICE and ORA PRICE, Plaintiffs in Error,

vs.

MAGNOLIA PETROLEUM COMPANY, a joint stock association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly and W. C. Proctor, Trustees; STATE OF OKLAHOMA, *ex rel.* Commissioners of the Land Office of the State of Oklahoma, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, Defendants in Error.

Order Allowing Writ of Error to the Supreme Court of the United States of America.

The above entitled matter coming on to be heard, upon the petition of the defendants in error herein for a writ of error to the Supreme Court of the United States, upon examination of said petition and the records in said matter and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the question presented by the record in said matter,

It is ordered:

That writ of error be and is hereby allowed from this Court to the Supreme Court of the United States to review the judgment and order complained of herein and rendered on the 21st day of March, 1922, and rehearing of which was denied by the Supreme Court of the State of Oklahoma on the 2nd day of May, 1922.

And it is further ordered that plaintiffs in error give bond herein in the sum of One Thousand Dollars to be approved by the Chief Justice of the Supreme Court of Oklahoma.

Ordered, adjudged and decreed this 21st day of July, 1922.

JOHN H. PITCHFORD,

*Acting Chief Justice of the Supreme
Court of Oklahoma.*

[SEAL]

Attest: WM. M. FRANKLIN,

Clerk Supreme Court of Oklahoma.

By JESSIE PARDOE, *Deputy Clerk.*

(Filed in Supreme Court of Oklahoma July 22, 1922,
William M. Franklin, Clerk.)

In the Supreme Court of the United States

WILLIAM T. PRICE and ORA PRICE, his wife, Plaintiffs in Error,

vs.

MAGNOLIA PETROLEUM COMPANY, a joint stock association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees; STATE OF OKLAHOMA,
ex rel. Commissioners of the Land Office of the State of
Oklahoma, and *ex rel.* S. P. Freeling, Attorney General
of the State of Oklahoma, Defendants in Error.

Writ of Error.

United States of America:

The President of the United States of America to the
Honorable, the Judges of the Supreme Court of the State of
Oklahoma, greetings:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court on appeal from the District Court of Stephens County, State of Oklahoma, before you, or some of you, being the highest Court of law or equity of said State in which a decision could be had in the said suit between the Magnolia Petroleum Company, a joint stock association; John Seely, E. R. Brown, R. Waverly Smith, E. E. Plumly, and W. C. Proctor, Trustees; State of Oklahoma *ex rel.* Commissioners of the Land Office of the State of Oklahoma, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, plaintiffs in error, and William T. Price and Ora Price, his wife, defendants in error, wherein was drawn in question the validity of the Statute of the United States of America, to wit, the Act of June 16, 1906 (Enabling Act of the State of Oklahoma), 30 Stat. L. 507, and the decision was against its validity; and wherein was drawn in question the validity of an authority exercised under the said Statute of the United States of June 16, 1906, and the decision was against its validity. And wherein was drawn in question the validity of the Statute of the State of Oklahoma, to wit, the Act of May 26, 1908, Session Laws 1907-

08, page 490, and an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the said Act of Congress of the United States, of June 16, 1906, 30 Stat. L. 507; and the decision was in favor of the validity of the Statute of the State of Oklahoma, and of the authority exercised under the State of Oklahoma.

And, wherein was drawn in question the validity of the construction of the clause in the Constitution of the United States, to wit, Section 10, Article I, and the Amendments numbered V and XIV to the said Constitution, and the decision was against the construction claimed for said clause of said Constitution, and said Amendments thereto.

And there being manifest error in said decision, to the great damage of said William T. Price and Ora Price, defendants in error in said cause, as is said and appears by their complaint and assignment of errors, and being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States this 21 day of July, in the year of our Lord, 1922.

ARNOLD C. DOLDE,

*Clerk of the District Court of the United States
for the Western District of Oklahoma.*

[SEAL]

Allowed:

JOHN H. PITCHFORD,

*Acting Chief Justice of the Supreme Court
of the State of Oklahoma.*

Attest: WM. M. FRANKLIN,
*Clerk of the Supreme Court of
the State of Oklahoma.*
By JESSIE PARDOE, *Deputy Clerk.*

[SEAL]

In the Supreme Court of the State of Oklahoma.

No. 12,243.

MAGNOLIA PETROLEUM COMPANY, a joint stock association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees; STATE OF OKLAHOMA,
ex rel. Commissioners of the Land Office of the State of
Oklahoma, and *ex rel.* S. P. Freeling, Attorney General
of the State of Oklahoma, Plaintiffs in Error.

vs.

WILLIAM T. PRICE and ORA PRICE, Defendants in Error.

Præcipe for Transcript of the Record.

Come now the defendants in error, William T. Price and Ora Price, by their counsel, and direct the Clerk to make a transcript of the record and proceedings had in said cause, showing the following:

- (1) The petition in error, complete.
- (2) The petition for injunction, complete.
- (3) The amended petition, complete.
- (4) The answer to amended petition, complete.
- (5) The application of State of Oklahoma to intervene, complete.
- (6) The petition of intervention, complete.
- (7) The answer to petition of intervention, complete.
- (8) Reply of plaintiff to defendants' answer, complete.
- (9) The reply of intervener, the State of Oklahoma, to defendants' answer to its petition in intervention, complete.
- (10) The recital in the record as to the appearances in the case and the application and leave of the Court to file the pleadings of the respective parties.
- (11) The evidence in the case, to consist of each and all of the paragraphs of the Stipulation of Facts offered in evi-

dence by each party, and the rulings of the Court thereon, excluding the duplication of exhibits; all oral evidence and record evidence in the case, excluding the duplications of exhibits offered. Omitting the Articles of Trust Agreement of the Magnolia Petroleum Company. Omitting the Exhibits "F," "F-1," "F-2," "F-3," and "F-4," including only the letter of the Secretary attached thereto. Omitting defendants' exhibit "L." Omitting depositions of Frank Carter, Robert May and C. S. Potter. Omit defendants' Exhibit "M." Omit depositions of W. A. Durant and R. H. Wilson.

(12) Journal Entry of Judgment.

(13) Motion for New Trial, and Journal Entry overruling the same, and the Journal Entries overruling the Motion for New Trial and Extending the time for Making and Serving Case-made.

(14) All the proceedings in the Supreme Court, including the orders and judgment and opinion of the Court; the Motion for Re-Hearing and Order of the Court thereon. Omitting the orders of the Court concerning the drilling of wells during litigation and the custody of the property pending litigation.

(15) Assignment of Errors filed.

Dated this 8 day of July, 1922.

BLAKE & BOYS,
STUART, SHARP & CRUCE,
STEVENS & RICHARDSON,
Attorneys for Defendants in Error,
William T. Price and Ora Price.

(Filed in Supreme Court of Oklahoma, Jul 8, 1922. William M. Franklin, Clerk.)

We, the undersigned attorneys for the plaintiff in error, the Magnolia Petroleum Company, a Trust, do hereby acknowledge service of the above and foregoing praecipe on us this the 8th day of July, 1922.

B. B. BLAKNEY.
HUBERT AMBRISTER.

We, the undersigned attorneys for the State of Oklahoma, *ex rel.* Commissioners of the Land Office of the State of Okla-

homa, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, do hereby acknowledge service of the above and foregoing praecipe on this the 8th day of July, 1922.

GEO. F. SHORT,
Attorney General.

C. W. KING,
Asst. Attorney General.

GEO. E. MERRITT,
*Attorney for Commissioners
of the Land Office.*

In the Supreme Court of the United States.

In the Supreme Court of the State of Oklahoma.

WILLIAM T. PRICE and ORA PRICE, his wife, Plaintiffs in Error,

vs.

MAGNOLIA PETROLEUM COMPANY, a joint stock association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly and W. C. Proctor, Trustees; STATE OF OKLAHOMA, *ex rel.* Commissioners of the Land Office of the State of Oklahoma, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, Defendants in Error.

Bond.

Know All Men By These Presents:

That we, William T. Price and Ora Price, as principals, and B. C. Smith, H. D. Miller, G. N. Jeffries, R. W. Bell, P. Stein, as suretis, are held and firmly bound unto the Magnolia Petroleum Company, and the State of Oklahoma, defendants in error, in the sum of one thousand and no/100 dollars, to be paid to the said obligees, their successors, representatives and assigns; to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Dated this 25th day of July, A. D. 1922.

That, whereas, the above named plaintiffs in error, William

T. Price and Ora Price, have applied for a writ of error to the Supreme Court of the United States to reverse the action taken by the Supreme Court of the State of Oklahoma;

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their above named writ of error to effect and shall answer all costs and damages, if they fail to make good their plea, then this obligation shall be void. Otherwise to remain in full force and effect.

I wrote the name of William T.

Price hereto at his request
and in his presence.

E. H. BOND

Additional witness to William
T. Price signature.

E. E. MORRIS

Signed, sealed and delivered
in the presence of

J. F. SHARP.

CAROLAN L. LAMBLEY.

His

WILLIAM X T. PRICE,

Mark

ORA PRICE,

Principals

B. C. SMITH,

H. D. MILLER,

G. N. JEFFRIES,

R. W. BELL,

P. STEIN,

STATE OF OKLAHOMA,

Stephens County, ss:

On this 26th day of July, 1922, before me personally appeared Ora Price, to me known to be the person who executed the above and foregoing Bond, and acknowledged that she executed the same as her free act and deed.

GLADYS W. ROBERSON,

Notary Public.

[SEAL]

My Commission expires Jan. 24, 1924.

STATE OF OKLAHOMA,

Oklahoma County, ss:

On this 25th day of July, 1922, before me personally appeared B. C. Smith, H. D. Miller, G. N. Jeffries, R. W. Bell,

P. Stein, to me known to be the persons who executed the above and foregoing Bond, and acknowledged that they executed the same as their free act and deed.

CAROLAN L. LAMBLEY,
Notary Public.

[SEAL]

My Commission expires December 15, 1924.

STATE OF OKLAHOMA,
Oklahoma County, ss:

B. C. SMITH, being by me duly sworn, states: That he is a resident and householder of Caddo County, Oklahoma, and that he is worth the sum of one thousand (\$1,000.00) dollars over and above his just debts and legal liabilities and property exempt from execution.

H. D. MILLER, being by me duly sworn, states: That he is a resident and householder of Comanche County, Oklahoma, and that he is worth the sum of one thousand (\$1,000.00) dollars over and above his just debts and legal liabilities and property exempt from execution.

B. C. SMITH,
H. D. MILLER.

Subscribed and sworn to before me this 25th day of July, A. D. 1922.

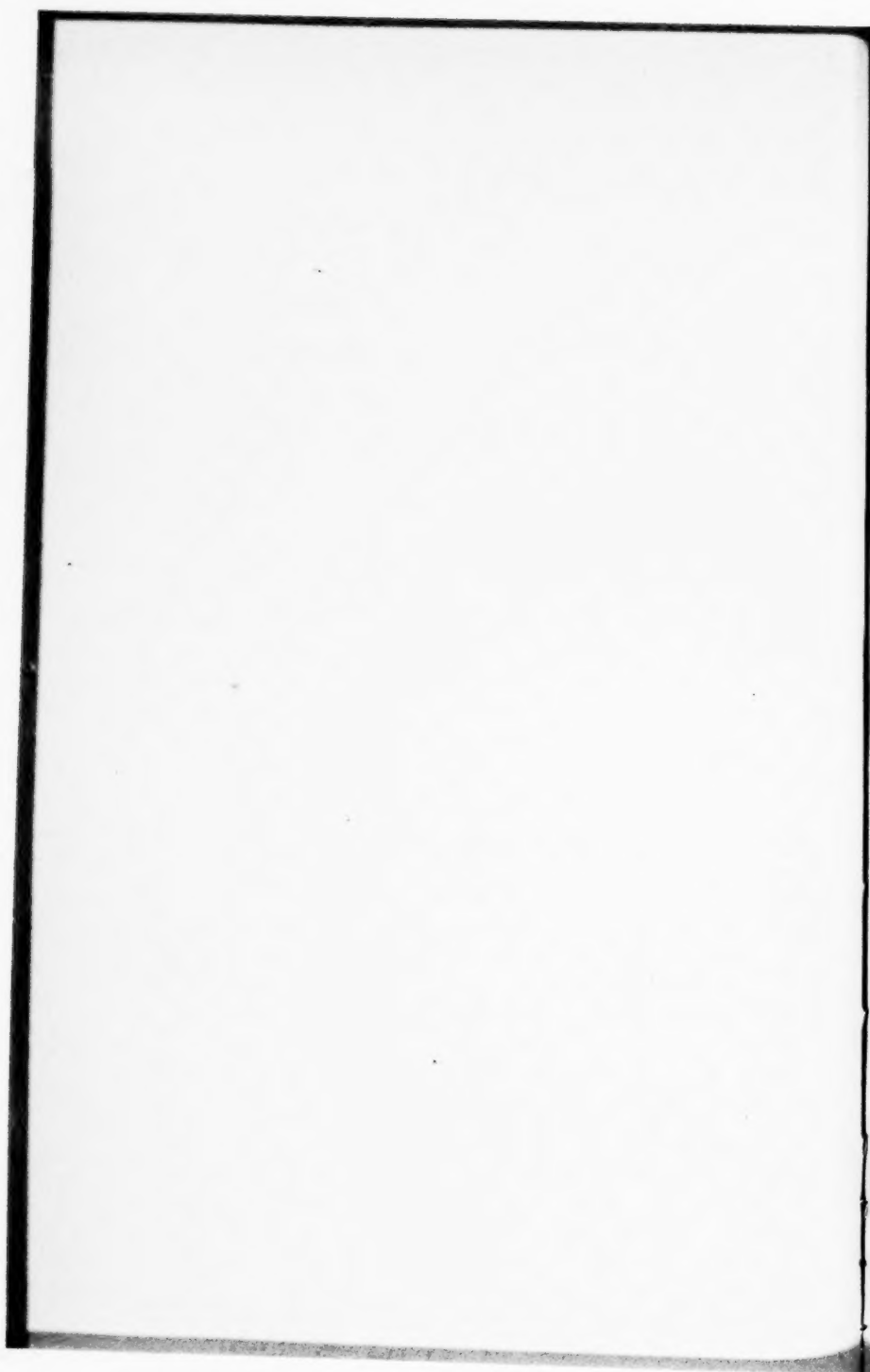
CAROLAN L. LAMBLEY,
Notary Public, Oklahoma County, Oklahoma.

[SEAL]

My Commission expires Dec. 15, 1924.

The above Bond is hereby approved this 29th day of July, A. D. 1922.

JOHN H. PITCHFORD,
*Acting Chief Justice of the Supreme
Court of the State of Oklahoma.*



In the Supreme Court of the State of Oklahoma.

MAGNOLIA PETROLEUM COMPANY, a joint stock association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly
and W. C. Proctor, as Trustees; STATE OF OKLAHOMA, *ex
rel* Commissioners of the Land Office of the State of
Oklahoma, and S. P. Freeling, Attorney General of the
State of Oklahoma, Plaintiffs in Error,

vs.

WILLIAM T. PRICE and ORA PRICE, Defendants in Error.

No. 12,243.

Petition in Error.

Come now the plaintiffs in error and complain of the said defendants in error for that in a certain action pending in the District Court of Stephens County, State of Oklahoma, where in the Magnolia Petroleum Company, a Joint Stock Association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly and W. C. Proctor, as Trustees, Plaintiffs in Error, were plaintiffs, and the State of Oklahoma was an Intervenor therein, and the defendants in error were defendants, an order was made and entered on December 1st, 1920, overruling the motion to strike certain paragraphs of the answer of the defendants in error, and on the 1st day of December, 1920, a certain order was made by the said District Court overruling the demurrer of the plaintiffs therein to the answer of the defendants, and on the 3rd day of March, 1921, an order was made overruling the motion to strike, made and filed by the State of Oklahoma, as Intervenor, in said action, and an order on the same day was made and entered overruling a demurrer filed by the State of Oklahoma, the intervenor therein, and that on the 18th day of April, 1921, a certain order, decree and judgment, involving the merits of the action and a material part thereof, was entered in the District Court of said Stephens County, and on the 18th day of April, 1921, a final order was entered in said Court overruling the motion for a new trial filed by each of the plaintiffs in error, and on the said 18th day of April, 1921, the said order, judgment and decree vacated and dissolved the temporary injunction theretofore issued against the defendants in error, and appointed a Receiver for the property in controversy, and that there was error in each and all of the

said proceedings, orders, judgments and decrees as follows, to wit:

1. That the said District Court erred in overruling the motion of the Magnolia Petroleum Company to strike certain paragraphs and matters from the answer of the defendant in error, as appears from page 87 of the case-made.

2. That the said District Court erred in overruling the demurrer of the plaintiffs to the answer of the defendants, as appears on page 90 of said case-made.

3. That the District Court erred in overruling the motion of the State of Oklahoma to strike certain matters from the answer of the said defendants, found on page 103 of the record.

4. That the said District Court erred in overruling the demurrer filed by the State of Oklahoma, found on page 103 of the record.

5. That the District Court erred in entering a judgment found on page 337 of the record and in each and every paragraph of the said judgment.

6. That the District Court erred in refusing to make the injunction permanent, issued in said action.

7. That the District Court erred in finding the issues in favor of the defendants.

8. That the District Court erred in overruling the motion for new trial filed by the Magnolia Petroleum Company, appearing on pages 242-3 of the record.

9. That the District Court erred in overruling the motion for new trial of the State of Oklahoma, found on pages 345-6 of the record.

10. That the District Court erred in the admission of the evidence of the defendants, and in the admission of each and all of such evidence.

11. That the District Court erred in the appointment of a Receiver in said action.

12. That the District Court erred in admitting incompetent, irrelevant and immaterial evidence on the part of the defendants.

That there is hereto attached and marked "Exhibit A", a duly certified case-made, properly attested and filed, and a transcript of the proceedings of the said Court, and the said errors appear fully in said record and proceedings shown by said case-made and transcript.

Wherefore, Plaintiffs in error pray that the said judgment

so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiffs in error and against the defendants in error upon the admitted facts in said record, and that the plaintiffs be restored to all the rights that they have lost by the rendition of such judgment, and that a supersedeas issue in said action, pending a final hearing, and that the Receiver be discharged, and that the injunction be continued in force; and for such other relief as the Court may deem just.

S. P. FREELING,
Attorney General,
GEO. E. MERRITT,
B. B. BLAKENEY,
HUBERT AMBRISTER,
Attorneys for Plaintiffs in Error.

Endorsed: Filed in Supreme Court of Oklahoma April 30, 1921. William M. Franklin, Clerk.

STATE OF OKLAHOMA,
Stephens County.

In the District Court.

No. 12,243.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association;
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, as Trustees, Plaintiff.

vs.

WILLIAM T. PRICE, and his wife, ORA PRICE, Defendants.

CASE-MADE.

Fled in District Court, April 28, 1921. G. A. Witt, Court Clerk. Jessie T. Barnes, Deputy.

Filed in Supreme Court of Oklahoma, April 30, 1921.
William M. Franklin, Clerk.

STATE OF OKLAHOMA,
Stephens County.

In The District Court.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association;
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, as Trustees, Plaintiff.

vs.

WILLIAM T. PRICE, and his wife, ORA PRICE, Defendants.

No. —————

Petition for Injunction.

Comes now the plaintiff, The Magnolia Petroleum Company, and represents that it is a joint stock association organized and existing under and by virtue of the laws of the State of Texas and licensed to do business within the State of Oklahoma, and that the defendants, William T. Price, and Ora Price, are residents of Stephens County, Oklahoma. The plaintiff for its cause of complaint against the defendants alleges and states:

First. That the State of Oklahoma is the owner of the following described real estate situated in Stephens County, Oklahoma, to wit:

The Northeast Quarter of Section 33, Township 1
South, Range 8 West,

and that on the 4th day of January, 1919, said State of Oklahoma, acting by and through the Commissioners of the Land Office of the State of Oklahoma, made, executed and delivered to the plaintiff an oil and gas mining lease on the above described land. A copy of said oil and gas mining lease is attached to this petition and made a part of the same and marked plaintiff's Exhibit "A".

Second. Plaintiff alleges that said defendants, William T. Price and Ora Price, are in possession of said premises, using the same for agricultural purposes; that on the 22nd day of March, 1916, the State of Oklahoma, acting by the Commissioners of the Land Office of the State of Oklahoma, made, executed and delivered to said defendants an agricultural

lease on the above described premises for a term of five years. A copy of said agricultural lease in blank is attached to this petition and made a part of same and marked plaintiff's Exhibit "B."

Third. The plaintiff further alleges that under and by the terms of said oil and gas mining lease it has the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas from said above described premises and to occupy and use so much of the surface thereof as may be reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing such oil and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

The plaintiff further alleges that said premises are in the same section of land as what is known as Empire Well No. 1, which has been recently "drilled in" in that section and which is now producing approximately 800 barrels of oil per day and that drilling for oil and gas is being done in all directions from said quarter section of land and that it is necessary in order to protect the interests of the State of Oklahoma and the rights of the plaintiff under said oil and gas lease that said above described premises should be developed for oil and gas. That there are a number of wells being drilled for oil and gas in the southwest quarter of said section of land, which are about down to the sand expected to be found in that vicinity and there is also a well being drilled just northeast of said above described premises in which the casing has been set and is expected to be drilled into the sand within a few days. If oil or gas should be found in paying quantities in any of the surrounding wells being drilled it will be necessary for the plaintiff, under said oil and gas mining lease, to immediately explore and develop said above described premises for oil and gas, in order to hold its contract with the State of Oklahoma, and it is therefore necessary for the plaintiff to begin operations for the development of said premises at this time and immediately. The plaintiff further

alleges that on the 24th day of May, 1920, acting by and through its duly authorized representatives, it went upon said above described premises for the purpose of making a location for the drilling of a well; that the place it decided to make the location is in the southwest quarter of southwest quarter of northeast quarter of said Section 33, Township 1 South, Range 8 West, and that the said defendant, William T. Price, objected to the defendant going on said premises and making said location or on any part of said premises and absolutely refused to permit the plaintiff to go on said location or any part of said premises for the purpose of drilling thereon for oil and gas, and forbade plaintiff from going on said premises for said purposes and ordered its representatives to keep off the same and positively refused to allow the plaintiff, its agent or employees, to go upon said premises for the purpose of drilling for oil and gas or making any development thereon, or any part of the same. The plaintiff is now ready and desires to immediately begin the erecting of a derrick on said location above described and to begin preparation to drill a well thereon and to explore and develop all of said premises for oil and gas. And the plaintiff is being deterred from said action by the acts and conduct of the defendants aforesaid.

The plaintiff further alleges and states that it offered to pay the defendants for any loss or damage they might sustain by reason of the plaintiff moving on said premises and on said location and to his crops and to pay him for any labor that he may lose by reason of the plaintiff moving on said location or on said premises but that the defendants still refused to allow the plaintiff to go upon said premises for the purposes aforesaid.

Fourth. The plaintiff further allege that they have no adequate, speedy or sufficient remedy at law and that the defendants are not able to respond in damages to the plaintiff for their acts and conduct as aforesaid.

Wherefore, the plaintiff prays the Court for a permanent order enjoining the defendants, and each of them, from, in any manner, interfering with the plaintiff in its drilling operations or other operations or exploration on said premises for oil and gas and that a day be set for this Court for a hearing

on this petition and that pending a hearing of this petition for said permanent injunction the plaintiff prays for a temporary restraining order restraining the defendants from interfering with the plaintiff in going on or upon the said premises and making preparations to drill wells for oil and gas or in drilling wells thereon for oil and gas or in any manner interfering with the plaintiff in operating for oil or gas and in the operation and development of the same as aforesaid under said oil and gas mining lease. That said restraining order be immediately issued by this Court and that the costs of this proceedings be taxed against the defendants.

WOMACK & BROWN,
BLAKENEY & MAXEY,
Attorneys for Plaintiff.

STATE OF OKLAHOMA,
Stephens County.

Ralph Talley being first duly sworn says upon his oath: That he has read the foregoing petition and knows the contents thereof and that the same is true and correct. That his affidavit is made for the Magnolia Petroleum Company and that the President nor none of the officers or directors of the Magnolia Petroleum Company are in Stephens County, Oklahoma, at this time; that the affiant is their duly authorized agent and that by reasons aforesaid this affidavit is made by said agent.

RALPH TALLEY.

Subscribed and sworn to before me this 25th day of May, 1920.

O. P. WILKINSON,
Notary Public.

(Seal)

My Commission expires January 17th, 1924.

Endorsed: (No exhibits attached). No. 2885. Filed in District Court May 25, 1920. G. A. WITT, Court Clerk.

STATE OF OKLAHOMA,
Stephens County.

In the District Court.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association;
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, as Trustees, Plaintiff.

vs.

WILLIAM T. PRICE, and his wife, ORA PRICE, Defendants

No. —————

Amended Petition

Comes now the plaintiff, The Magnolia Petroleum Company, and represents that it is a joint stock association organized and existing under and by virtue of the laws of the State of Texas and licensed to do business within the State of Oklahoma, and that the defendants, William T. Price and Ora Price, are residents of Stephens County, Oklahoma. The plaintiff for its cause of action and complaint against the defendants alleges and states:

First. That the State of Oklahoma is the owner of the following described real estate situated in Stephens County, Oklahoma, to wit:

The Northeast Quarter of Section 33, Township 1
South, Range 8 West.

and that on the 4th day of January, 1919, said State of Oklahoma, acting by and through the Commissioners of the Land Office of the State of Oklahoma, made, executed and delivered to the plaintiff an oil and gas mining lease on the above described land. A copy of said oil and gas mining lease is attached to this petition and made a part of the same and marked plaintiff's "Exhibit A".

Second. Plaintiff alleges that said defendants, William T. Price and Ora Price, are in possession of said premises, using the same for agricultural purposes; that on the 22nd day of March, 1916, the State of Oklahoma, acting by the Commissioners of the Land Office of the State of Oklahoma, made, executed and delivered to said defendants an agricultural

lease on the above described premises for a term of five years. A copy of said agricultural lease in blank is attached to this petition and made a part of same and marked plaintiff's "Exhibit B".

Third. Plaintiff alleges that heretofore, to wit, on the 26th day of August, 1915, the Commissioners of the Land Office of the State of Oklahoma, in a regular duly held session in the office of the Secretary of State, at Oklahoma City, made and had the following proceedings in *re.* segregation of land for oil and gas purposes:

The Secretary presented the following recommendation to the board for approval:

"Whereas, we have had offers from reputable parties to place oil and gas bids on the following unsegregated school lands, I hereby recommend that the following described lands be segregated for oil and gas purposes, and that they be advertised for bids for leasing * * * * the Northwest Quarter of Section 33, Township 1 South, Range 8 West, Stephens County, * * * *. After discussion by the Board, it was thereupon moved by Mr. Lyon and seconded by Mr. Howard that the above sections and quarter sections be declared valuable for mineral purposes, and that the same be segregated and withheld from sale."

All voted aye and the motion prevailed, and there was duly entered of record in said office their said finding, declaring that such oil or gas character exists, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits thereby conclusively withhold the same from sale, lease or other alienation, except as provided by the laws of Oklahoma. And thereafter, the said Commissioners, desiring to lease said land for oil and gas purposes to the same extent and in the same manner as a private owner of land in fee could in his own right execute a grant thereto, did duly authorize the advertisement of the said tract for leasing for oil and gas purposes and for bids to be made thereon, and after due advertisement an oil and gas lease thereon was duly sold to the plaintiff herein and a lease duly executed as shown by Exhibit "B".

Fourth. The plaintiff further alleges that under and by the

terms of said oil and gas mining lease it has the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas from said above described premises and to occupy and use the same and so much of the surface thereof as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing and removing such oil and natural gas. Also the right to obtain from wells or other sources on said operations (land), except the private wells or ponds of the surface owner or lessee and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

The plaintiff further alleges that said premises are in the same section of land as what is known as Empire Well No. 1, which has been recently drilled in that section and which is producing approximately 800 barrels of oil per day and that drilling for oil and gas is being done in all directions from said quarter section of land; that it is necessary, in order to protect the interest of the State of Oklahoma and the rights of the plaintiff under said oil and gas lease, that said above described premises should be developed for oil and gas. That there a number of wells being drilled for oil and gas in the Southwest Quarter of said section of land, which are down about to the sand expected to be found in that vicinity, and there is also a well being drilled just northwest of said above described premises in which the casing has been set and is expected to be drilled into the sand within a few days. If oil or gas should be found in paying quantities in any of the surrounding wells being drilled, it will be necessary for the plaintiff, under said oil and gas mining lease, to immediately explore and develop said above described premises for oil and gas in order to hold its contract with the State of Oklahoma, and it is therefore necessary for the plaintiff to begin operations for the development of said premises at this time and immediately. The plaintiff further alleges that on the 24th day of May, 1920, acting by and through its duly authorized representatives, it went upon said above described premises for the purpose of making a location for the drilling of a well; that the place it decided to make the location is in the Southwest Quarter of the Northeast Quarter of said Section 33, Township 1 South, Range 8 West, and that the said defendant, William T. Price, objected to the plaintiff going on said pre-

mises and making said location, or on any part of said premises and absolutely refused to permit the plaintiff to go on said location or any part of said premises for the purpose of drilling thereon for oil and gas and forbade plaintiff from going on said premises for said purposes and ordered its representatives to keep off the same, and threatened plaintiff and its agent with bodily injury, and by force and violence refused to allow the plaintiff, its agents or employees, to go upon said premises for the purpose of drilling for oil and gas or making any development thereon, or any part of the same. The plaintiff is now ready and desires to immediately begin erecting a derrick on said location above described, and to begin preparation to drill a well thereon and to explore and develop all of said premises for oil and gas. And the plaintiff is being deferred from said action by the acts and conduct of the defendants aforesaid.

The plaintiff further alleges and states that it offered to pay the defendants for any loss or damage that they might sustain by reason of the plaintiff moving on said premises and on said location, to their crops, and to pay them for any labor that they might lose by reason of the plaintiff moving on said location or on said premises, but that the defendants still refused to allow the plaintiff to go upon said premises for the purposes aforesaid.

Fifth. That after the filing of the original petition, plaintiff drilled two wells to a depth of about 1700 feet to the oil and gas bearing sand, and discovered oil and gas in paying quantities, and is now producing 120 barrels of oil per day from the said premises and marketing the same, and two other wells are in the course of drilling, one of which has reached the sand, but is not drilled in. That the amount and value of said oil cannot be stated or determined, and that unless plaintiff is permitted to continue the development and production of such oil, it will be subjected to irreparable injury, which can not be estimated or determined with any accuracy in a proceeding at law, and the defendants would be wholly unable to respond in damages for such damages as would be sustained.

Sixth. That under and by virtue of the terms of the lease attached to the said petition and marked Exhibit "A", the defendants right terminated and expired on the 31st day of December, 1914, and the defendant, desiring to renew said

lease, under and by virtue of said rules adopted by the Commissioners of the Land Office of the State of Oklahoma, by G. A. Smith, Secretary of the Commissioners of the Land Office of the State of Oklahoma, entered into an extension agreement with the said W. T. Price, the defendant herein, by the terms of which the said W. T. Price agreed, among other things, that his lease and right to possession of said land, and interest therein, should be subject to all the laws of the State of Oklahoma which are now or may hereafter be in force and effect, and which may hereafter be passed. A copy of the said extension agreement, duly executed by said defendant, is hereto attached and marked Exhibit "C" and made a part hereof; that thereafter, under the laws of said State as hereinbefore stated, the said Northeast Quarter of Section 33, Township 1 South, Range 8 West, was by the Commissioners of the Land office, designated, set apart, segregated and reserved as mineral, oil and gas lands, as provided by the laws of the State of Oklahoma, and the said W. T. Price was in the possession of said land without any renewal of his former lease, but under the terms and conditions of the said laws and the said extension agreement, and thereby agreed to and consented to such segregation and the action of the said Commissioners of the Land Office in selling the oil and gas rights and in executing the lease to the plaintiff passed all the oil and gas rights to this plaintiff.

That subsequent to the expiration of said lease and its extension, the defendant continued to occupy said premises, holding over from year to year under the rules and regulations of the said Commissioners and the laws of said State, and the Commissioners accepted from time to time the annual rentals and adopted a rule providing that any person who did not execute a new lease, but held over, should be presumed to hold over under the terms and conditions of the old lease and the extension thereof and the rules and regulations of the Commissioners and the laws of the said State, and such rules and regulations were known to the defendant and he held over subject to their terms and conditions.

That in 1916, as required by law, the Commissioners were required to appraise said land, and appraised the same and fixed the rentals at \$95.00 a year and the said defendant recognizing the rules and regulations and law authorizing such ap-

praisement and increase of rentals, paid since 1916, \$95.00 a year, each year, rental for said land.

Seventh. The plaintiff further alleges that it has no adequate, speedy or sufficient remedy at law, and that the defendants are not not able to respond in damages to the plaintiff for their acts and conduct as aforesaid.

Wherefore, the plaintiff prays the Court for a permanent order, enjoining the defendants, and each of them, from in any manner interfering with the plaintiff in its drilling operations or other operations or explorations on said premises for oil and gas, and that a day be set for this court for a hearing on this petition and that, pending a hearing of this petition for said permanent injunction, the plaintiff prays for a temporary injunction order restraining the defendants from interfering with the plaintiff in going upon said premises and making preparation to drill wells for oil and gas or in drilling wells thereon for oil and gas or in any manner interfering with the plaintiff in operating for oil and gas and developing the same as aforesaid under said oil and gas mining lease.

That said restraining order be immediately issued by this court and that the costs of this proceeding be taxed against the defendants.

WOMACK & BROWN,
BLAKNEY & MAXEY,
Attorneys for Plaintiff.

STATE OF OKLAHOMA,
Oklahoma County, ss:

B. B. Blakney, being first duly sworn, says upon oath that he has read the foregoing amended petition and knows the contents thereof, and that the same is true and correct. That this affidavit is made for the Magnolia Petroleum Company and the president nor none of the officers or directors of the Magnolia Petroleum Company are in Oklahoma County, Oklahoma, at this time; that the affiant is their duly authorized agent and attorney, and that by reasons aforesaid this affidavit is made by said agent.

B. B. BLAKENEY.

Subscribed and sworn to before me this 4th day of November, 1920.

[SEAL]

G. A. WITT,
Court Clerk, Stephens County, Oklahoma.

EXHIBIT "A"

THE STATE OF OKLAHOMA

Oil and Gas Mining Lease.

T-162.

This indenture of lease, made and entered into in duplicate, on this the 4th day of January, A. D., 1919, by and between the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Magnolia Petroleum Company, John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumly, and Geo. C. Greer, as Trustee, Box 1667, of Dallas, Texas, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Constitution and laws of the State of Oklahoma relating to the segregation of the oil and gas deposits and the leasing thereof on school and other public lands belonging to the State of Oklahoma, witnesseth:

1. The lessor, for and in consideration of eight thousand (\$8,000.00) dollars, the receipt whereof is hereby acknowledged, and the royalties, covenants, stipulations and conditions hereinafter contained and hereby agreed to be paid, observed and performed by the lessee, and his lawful assigns, does hereby demise, grant, lease and let unto the lessee for the term of five years from the date hereof, and as long thereafter as oil or gas or either of them is produced in paying quantities, all the oil deposits and natural gas in or under the following described tract of land lying and being within the County of Stephens, in the State of Oklahoma, to wit:

The Northeast Quarter of Section Thirty-three (33), Township One (1) South, Range Eight (8) West of the Indian Meridian, and containing 160 acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost,

oil and natural gas as fuel as far as necessary to the development and operation of said property.

2. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office of the State of Oklahoma, or their successors, a royalty of one-eighth part of the oil or gas produced from the leased premises or in lieu thereof pay to the State the market value of said royalty interest, as the Commissioners may elect. All oil and gas due to the State under this contract, shall be delivered by the lessee herein, free of cost, into pipe lines, tanks or cars, or settled or paid for before removing the same from the premises if handled in any other way. The lessee shall furnish to the lessor certified copies of gauge tickets, sales shipments and amount of gross production, at their offices in Oklahoma City. Gas to be metered on the premises under high pressure unless some other method of gauging and metering same shall be hereafter agreed upon by the parties hereto in writing.

3. The lessee shall exercise diligence in sinking wells for oil and natural gas on the land covered by this lease, and shall drill a sufficient number of wells to offset the wells upon adjoining contiguous premises, said offset wells to be commenced within ten days after completion of any producing well upon such adjoining contiguous premises, unless a different time is prescribed by notice in writing from the lessor, and be prosecuted diligently and continuously until completed; and the said lessee shall operate the leased premises for oil and gas to same extent as individual and corporate premises are being operated within the general oil and gas fields where such land is located, and failure to faithfully comply with the provisions shall be cause for forfeiture of this lease to the State.

At least one producing oil or gas well in paying quantities shall be drilled and completed within one year from the date hereof, or failing to do so the lessee shall pay to the lessor for each whole year the completion of such well is delayed, for not to exceed five years from the date hereof, in addition to the other consideration named herein, a rental of one (\$1.00) dollar per acre, payable annually, in advance, and if the lessee shall fail to drill at least one such well within any such yearly period, and shall fail to surrender this lease on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken as conclusively evidencing the election and covenant of the

lessee to pay the rental of One (\$1.00) Dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen (15) days after it becomes due at the end of any yearly period during which a well has not been commenced as herein provided shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation thereof, but such cancellation shall not in any wise operate to release or relieve the lessee from the covenants and obligations to pay such rental or any other accrued obligation. It being understood that the completion of one well producing oil or gas in paying quantities during the life of this lease, shall relieve the lessee of all future liability for said \$1.00 per acre hereunder, but the lessee shall, nevertheless remain obligated to drill an offset, or necessary offsets, and other wells necessary to the proper development and operation of said lease as herein otherwise provided; and provided further that unless a producing well of oil or gas is completed on the above described premises within five years from date hereof, this lease shall be void.

4. The lessee shall carry on the development and operation in a workmanlike manner; commit no waste on said land, and suffer none to be committed upon the portion in his occupancy; take good care of the same, and promptly surrender and return said premises upon the termination of this lease to the lessor, or to whomsoever shall be lawfully entitled thereto unavoidable casualty only excepted.

All tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells, shall remain the property of the lessee, and may be removed at any time prior to or at the termination of the lease by forfeiture or otherwise; and the lessee shall not permit any nuisance to be maintained on the premises; and shall not use said premises for any purposes then those authorized in the lease, and before abandoning any well, shall securely plug the same so as to effectually shut off all water from the oil bearing stratum, or in the manner required by the laws of the State of Oklahoma.

5. The lessee shall keep an accurate account of all oil and gas mining operations, including a log of each well drilled, duly sworn to by the contractor or driller, which shall be

filed with the Secretary to the Commissioners of the Land Office within thirty days after said well is completed. Accurate and reliable information concerning all wells and their operations and management shall be furnished to the Commissioners of the Land Office or their representative upon demand. The said lessee shall keep an accurate account showing the sales, prices, dates, purchases, and the whole amount of oil and gas mined or removed, and all sums due as royalties shall be a lien on the implements, tools and movable machinery or personal chattels used in operating said property, and also upon all the unsold oil and gas obtained from the land herein leased as security for the payment of said royalties.

6. The lessee shall be liable to the surface owner or surface lessee for all damages or loss accruing to the surface interests in said land, and to all crops and improvements thereupon and appurtenances and hereditaments thereunto belonging by reason of the oil or gas mining operations hereunder, and in the event the amount of such damages cannot be agreed upon by the lessee hereof and such surface owner or lessee, then the amount of such damages shall be determined as is or may be provided by law. The lessee hereof further agree to pay all such damages within ten days after the amount thereof is determined, and the amount of such damages may be recovered from the lessee hereof and his sureties upon the bond given to secure the faithful performance of this lease.

7. This lease shall be subject to the Constitution and laws of the State of Oklahoma, and the rules and regulations of the Commissioners of the Land Office now or hereafter in force relative to such leases; all of which are made a part and condition of this lease; provided, that no regulations made after the execution of this lease affecting either the length of the term hereof, the rate of royalty, or payment hereunder or the assignment hereof, shall operate to affect the terms and conditions of this lease.

8. No transfer or assignment of this lease or any part thereof, shall be valid, or convey any right in the assignee without the consent in writing of the Commissioners of the Land Office; and such assignee shall furnish a bond to the satisfaction of the Commissioners of the Land Office conditioned for the faithful performance of the covenants and conditions of this lease, and pay an assignment fee of five dollars.

9. Before this lease shall be in force and effect the lessee shall give a good and sufficient bond in the sum of One Thousand (\$1,000.00) Dollars, to be approved by the Commissioners of the Land Office, for the faithful performance of this lease.

10. Upon the violation of any of the substantial terms or conditions of this lease, the Commissioners of the Land Office shall have the right at any time after hearing upon ten days notice, given by registered mail to the last known address of such lessee, or by posting notice in writing in a conspicuous place upon the said premises, specifying the terms or conditions violations, to declare this lease null and void; and the said Commissioners for and on behalf of the State of Oklahoma, shall be entitled to recover from the lessee's bondsmen, all rents, royalties, charges, claims of every kind and nature due and owing and accruing and arising out of and by reason of this lease, on failure to comply with the provisions thereof, and the lessors shall be entitled and authorized to take immediate possession of the land.

11. It is further agreed that for any refinery of crude oil and its products, owned and controlled by the State of Oklahoma, the State shall have the preference right to purchase and receive the output from said premises at the market price thereof; provided, that this clause shall not prevent the lessee from selling the output of said leases to any person, firm, corporation whatsoever until notice in writing from the Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas or either of them and all sale of oil and gas or either of them under this proviso shall be valid and binding.

12. The lessee may at any time hereafter surrender and wholly terminate this lease upon payment of the rentals and other liabilities then accrued and due hereunder, and may exercise such right by filing a formal relinquishment and release of the said lease with the Secretary to the Commissioners of the Land Office; provided, that if such lease has been recorded, by causing the release thereof to be filed and recorded in the proper recording office, and upon a compliance with these requirements such lessee shall thereby be relieved from liability for rental thereafter accruing.

13. The surface owner or lessee of the said premises shall have gas free of cost from any well on said premises for

domestic use thereon by making his own connection with the well.

This contract is made subject to the Declaration of Trust of the Trustees of the Magnolia Petroleum Company, of day of April 24th, 1911, a copy of which is on file with the Secretary of State, and the Corporation Commission of the State of Oklahoma, at Oklahoma City, reference to which is hereby made, under which the parties contracting with the Magnolia Petroleum Company and the trustees thereof, must look alone to the property and assets of said Magnolia Petroleum Company for the satisfaction and payment of any demands against it, and the trustees and the stockholders are not to be held personally liable, which is agreed by the lessor herein.

In witness whereof, the parties hereunto subscribed their signatures on the day and year first above written.

COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA.

By R. L. Williams,

Governor and Chairman.

[SEAL]

Attest:

A. R. McKinney,

Secretary to the Commissioners of the Land Office.

MAGNOLIA PETROLEUM COMPANY,

Lessee.

By H. W. Williams,

Agent and Attorney in Fact.

Attest:

Secretary.

STATE OF OKLAHOMA,

Oklahoma County, ss:

Personally appeared before me, the undersigned Notary Public, within and for said County and State, R. L. Williams, to me known to be the person who subscribed the name of The Commissioners of the Land Office of the State of Oklahoma to the foregoing instrument, as its Chairman, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and

deed of such Commissioners of the Land Office, for the uses and purposes therein set forth.

LILLIAN A. DENNIS,
Notary Public.

[SEAL]

My commission expires August 18, 1920.

Acknowledgment for Individual.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Personally appeared before me, the undersigned Notary Public within and for said County and State, H. W. Williams, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and notarial seal on this 11th day of January, 1919.

LILLIAN A. DENNIS,
Notary Public.

[SEAL]

My commission expires August 18, 1920.

“EXHIBIT B”

Received Jan. 14, 1913.
Secretary.

Lease for Public Lands of the State of Oklahoma.

This lease made by and between the Commissioners of the Land Office of the State of Oklahoma, a Commission having charge of the sale, rental, disposal and management of the school and other public lands of the State of Oklahoma, and acting on behalf of said state, and hereinafter designated as parties of the first part, and William T. Price of Comanche and hereinafter designated as party of the second part, witnesseth:

That the said parties of the first part by virtue of the authority vested in them by the Constitution and Laws of the State of Oklahoma and in consideration of the covenants of the said party of the second part hereinafter set forth, hereby lease and let unto the said party of the second part the following described public land granted to said state by the

Congress of the United States, to wit: The northeast quarter of section 33, township 1 south, range 8 west, of the Indian Meridian in Stephens County, State of Oklahoma, to have and to hold the same for a period of two years from the first day of January, 1913, to and including the 31st day of December, 1914; provided, however:

This lease is made subject to the rights of the State of Oklahoma to sell and convey the land herein described at any time and that upon such sale, if any be provided by law prior to the expiration of this lease, the same shall thereupon expire, and the party of the second part shall as the lessee, shall be entitled to same at the highest bid, subject to such conditions limitations, restrictions, and exceptions as may be provided by law.

And as a consideration for the leasing of said land, the said party of the second part hereby agrees to pay to the said party of the first part, as rent therefor, the total sum of one hundred thirty one and no/100 dollars in installments as follows:

Sixty-five and 50/100 dollars for the first day of October, 1913, sixty-five and 50/100 dollars for the first day of October, 1914.

The said deferred payments are evidenced by two certain promissory notes of even date herewith and payable as above specified and signed by said party of the second part as principal and one qualified person, a resident of said state, as surety.

And as a security for the payment of the above described notes at the time the same are due and payable, the said party of the second part hereby expressly grants and gives unto the State of Oklahoma a first lien upon all crops and improvements now located, or which may be placed or made upon said land during the term of this lease.

Said party of the second part may, at the termination of this lease, remove any or all of his improvements, and he shall have the right to harvest or remove any growing crop on said land, provided, however; that in case said party of the second part is in default for non-payment of any rental or assessment of any nature, he shall not be allowed to remove such improvements or make such entry to secure crops until all arrearage is fully satisfied, said improvements that are

movable shall then be moved immediately within sixty days from termination of this lease.

If the said party of the second part shall be in default of the annual rental due the state for a period of three months and such delinquency is not paid within thirty days from the time of service of notice of delinquency, the parties of the first part shall declare this lease forfeited as by law provided and the land herein described shall revert to the State of Oklahoma the same as though this lease had never been made; provided, however, in case of forfeiture as provided by Section 6 of Chapter 118, Session Laws of the State of Oklahoma, of the year 1910, the party of the second part has the right of redemption by paying all delinquencies, fees and costs of forfeiture at any time before such land is advertised to be leased. The improvements now located or which may hereafter be placed on said described land in case of forfeiture and reverting of said land to the state as by law provided shall be sold under the direction of the Commissioners of the Land Office at public or private sale, upon due notice to the party of the second part, and the proceeds received therefrom shall inure to the said party of the second part after payment shall have been made to the state for all delinquencies and rents and expenses incurred in making such sale.

The said party of the second part hereby agrees, binds and obligates himself that he will not cut or remove, or permit to be cut or removed any timber from said land, that he will not quarry or remove, or permit to be quarried or removed, any building or valuable stone, from said land, that he will not mine or move or permit to be mined or moved any minerals therefrom, and that he will not remove or take from said land any sand or gravel or other deposits of like character without first obtaining written authority so to do as by the laws of said state provided. The said party of the second part hereby agrees, binds and obligates, that he is leasing said land for agricultural and grazing purposes and that he will use and occupy the same for no other purposes and that he will care for and cultivate the same in a husbandlike manner and that he will protect said land from waste and that he will not permit or suffer any waste or trespass to be committed on or against said land. The said party of the second part hereby agrees, binds and obligates himself that he will not assign,

transfer, or relinquish this lease and his interest therein and his interest in the improvements without the consent and approval of the said parties of the first part, and that he will not sublease or underlet the said land or any part thereof without written permission being first obtained from the said parties of the first part.

And it is hereby agreed that the said party of the second part shall have the preference right to re-lease said land as provided by the laws of said state. If at any time after the execution of this lease it is shown to the satisfaction of the parties of the first part that there has been any fraud or collusion upon the part of the second party to obtain the same, said lease shall be declared null and void at the option of the parties of the first part.

And it is hereby expressly agreed and understood that a violation of any of the terms of this lease, or the laws of the State of Oklahoma, concerning the public lands of said state by the said party of the second part shall subject this lease to cancellation and upon proof of the violation of any of the terms of said lease or said laws being made to the Commissioners of the Land Office of the State of Oklahoma such Commissioners of the Land Office shall have the right to cancel and declare the same null and void and of no effect and take possession of said premises and re-lease the same as by law provided.

This lease is executed in duplicate.

In witness whereof, the said parties have caused their signatures to be subscribed hereto on this 2nd day of January, 1913.

COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA.

By Lee Cruce,
Chairman.

Attest:

Jno. R. Williams,
Secretary.

WILLIAM T. PRICE, *Lessee.*

[SEAL]

STATE OF OKLAHOMA,
Stephens County, ss.

Before me, G. W. Yeager, a Notary Public, in and for said

county and state on this 13th day of January, 1913, personally appeared William T. Price, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

G. W. YEAGER,
Notary Public.

My commission expires Nov. 13, 1916.

[SEAL]

NOTE: The lines in this lease which are marked through appear the same way in the original lease with a red line drawn through the lines as indicated in this copy.

I, A. S. J. Shaw, duly elected, qualified and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, and custodian of the records of the said Commissioners, hereby certify that the attached copy of lease is a true and correct copy of the lease issued by the Commissioners to William T. Price, covering the northeast quarter of section 33, township 1 south, range 8 west, as shown by the records of this office.

Witness by hand and official signature at Oklahoma City, Oklahoma, on this the 29th day of May, 1920.

A. S. J. SHAW,
*Secretary to the Commissioners of
the Land Office, State of Oklahoma.*

[SEAL]

"EXHIBIT C."

Extension Certificate.

Whereas, on the 2nd day of January, 1913, the proper authorities having charge of leasing of state and school lands belonging to the State of Oklahoma, entered into a written lease or extension of lease with William P. Price, of Comanche P. O. for the following described lands situate in Stephens County, to wit: Northeast quarter of section 33, township 1 south, range 8 west, subject to sale under the directions of the Commissioners of the Land Office.

Whereas, under and by virtue of the terms thereof and the laws of the State of Oklahoma, said lease or extension of lease, expired on December 31st, 1914, and,

Whereas, it is provided under the terms of the said lease that the said lessee has the non-competitive preference right of renewal of the same, subject to the laws of the State of Oklahoma, and,

Whereas, on Nov. 16, 1914, the Commissioners of the Land Office of the State of Oklahoma, who have under and by virtue of the Constitution of said state, charge of the sale, rental, disposal and management of the school land and all public lands thereof, did, by resolution properly adopted, extend all leases or extensions thereof, on all lands expiring on December 31, 1914, up to and including the time of sale thereof, but in no case longer than December 31st, 1915, and directed the Secretary to said Commission to proceed to collect rents for the current year, then, this is to certify that the lease above described is hereby extended to and including the date of sale not longer than December 31st, 1915, such extension being made subject to all of the laws of the State of Oklahoma which are now or may hereafter be in force and effect, and which may hereafter be passed, and as a consideration for this extension and as rental for said described land for a period beginning on January 1st, 1915, and ending on December 31st, 1915, the said lessee binds and obligates himself to pay the Commissioners of the Land Office of the State of Oklahoma, the sum of sixty-five and 50/100 dollars, said payment to be made on or before October 1st, 1915.

This certificate is issued in duplicate.

In witness whereof, I have hereunto affixed my official signature as the duly acting and qualified Secretary to the Commissioners of the Land Office of the State of Oklahoma, on this Mar. 6, 1915, day of —, 1915.

G. A. SMITH,

*Secretary to the Commissioners of the
Land Office of the State of Oklahoma.*

I, _____, the above named lessee do hereby accept such extension under the terms and conditions above mentioned.

In witness whereof, I have hereunto affixed my signature this-----day of-----, 1915.

W. T. PRICE,
Lessee.

Witness to Signature:
J. M. STEPHENS
ERNEST E. BROWN.

That Thereafter, to wit: on November 18, 1920, there was filed in said cause by the defendants, An Answer to Amended Petition of Plaintiff, which answer so filed is in words and figures as follows, to wit:

In the District Court.

STATE OF OKLAHOMA,
Stephens County.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association;
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, as Trustees, Plaintiff.

vs.

WILLIAM T. PRICE and ORA PRICE, his wife, Defendants.

Answer to Amended Petition.

Come now the defendants, William T. Price and Ora Price, and for their answer to the plaintiff's Amended Petition, allege and state:

FIRST COUNT.

Defendants allege that the plaintiff is the owner of and interested in pipe lines and transportation of oil and gas, both in Oklahoma and Texas, and is affiliated and confederated with companies and persons engaged in operating pipe lines and transportation of oils and gas both in Oklahoma and Texas, and by reason thereof the plaintiff herein cannot hold an oil and gas lease upon the public lands in the State of Oklahoma, and that any purported lease upon the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west of the Indian Meridian to the plaintiff is, for that reason, null and void.

SECOND COUNT.

1. Defendants deny each and every allegation therein con-

tained, excepting such as are hereinafter specifically admitted.

2. Defendants deny that the State of Oklahoma is the absolute owner of the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west, and alleges that the title of the State of Oklahoma and of these defendants is as hereinafter set out.

3. That under and by virtue of the Acts of Congress the President of the United States was authorized and empowered from time to time to reserve and set aside for the Territory of Oklahoma, and other territories, certain lands for public schools, penal institutions and public buildings, and that the President of the United States did set aside for such purposes sections 16 and 36 and sections 13 and 33, in Oklahoma Territory, and that under and by virtue of the Act of Congress approved June 6, 1900, 31 Stat. L., 680, Congress did set aside, together with other lands, section 33 for the Territory of Oklahoma and the future State of Oklahoma, and reserved said lands from sale or homestead entry. That said act applies to, and covers the lands involved in this controversy.

4. That under and by virtue of the Acts of Congress, and the Rules and Regulations of the Department of the Interior, prior to statehood, the Honorable Governor of the Territory of Oklahoma, the Honorable Secretary of the State of Oklahoma, and the Honorable Superintendent of Public Instructions of the Territory of Oklahoma were constituted a board for the leasing of public lands in the Territory of Oklahoma, and under and by virtue of said Act of Congress and said Rules and Regulations of the Secretary of the Interior and the laws in force at said time said board did execute leases to the public lands within the Territory of Oklahoma, and on that tract of land involved in this controversy, as hereinafter shown by leases set out.

5. That under and by virtue of an Act of Congress approved June 16, 1906, commonly known as the Enabling Act, Section 33, together with other lands in the territory comprising Oklahoma Territory and including the lands in controversy, were granted to the State of Oklahoma upon certain conditions, limitations and covenants with respect to their disposition and sale.

6. That under and by virtue of Section 10 of said Act of Congress approved June 16, 1906 (commonly known as the

Enabling Act), provision is made for the sale of Sections 13 and 33, including lands in controversy, and giving to the lessee the Preference Right to purchase in the following language, to wit:

“Preference Right to purchase at the highest bid being given to the lessee at the time of such sale.”

Said Act also provides that the Rules and Regulations for the sale of said land shall be as prescribed by the Legislature of said state, and also provides for the appraisement of said lands by three disinterested appraisers, non-residents of the county wherein said lands are situated, and the said appraisers so designated are required to make a true appraisement of said land at the actual cash value thereof, exclusive of improvements, and separately appraise the improvements at their fair and reasonable value, and that no sale shall be had for less than the appraised value of the land. That said Section 10 is as follows, to wit:

“That said sections thirteen and thirty-three, aforesaid, if sold, may be appraised and sold at public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the legislature of said state may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods of not more than five year, under such rules and regulations as the legislature shall prescribe, and until such time as the legislature shall prescribe such rules, these and all other lands granted to the state shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for designated purposes only, and until such time as the legislature shall prescribe as aforesaid said land shall be leased under existing rules; *Provided*, That before any of the said lands shall be sold, as provided in Sections nine and ten of this Act, the said land and the improvements thereon shall be appraised by three disinterested appraisers, who shall be non-residents of the county wherein the land is situated, to be designated as the legislature of said state shall prescribe, and the said appraisers shall make a true appraisement of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereon at their fair and reasonable cash

value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall under such rules and regulations as the legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements, and to the state the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract of land less than the appraisal thereof shall be accepted."

7. Section 22 of said Act approved June 16, 1906, commonly known as the Enabling Act, required the Constitutional Convention of the State of Oklahoma to irrevocably accept the terms and conditions of this Act as follows, to wit:

"That the Constitutional Convention provided for herein, shall, by ordinance irrevocable, accept the terms and conditions of this Act."

8. That thereafter and pursuant to the requirements and the privileges granted under the Enabling Act, the people of the proposed State of Oklahoma held their Constitutional Convention and said Constitutional Convention, duly assembled in said State of Oklahoma, did, on the 22nd day of April, 1907, pass the following ordinance, irrevocably accepting the terms, conditions and limitations of the Enabling Act in the following language, to wit:

"Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, 'An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitutional and State Government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a constitution and State Government and be admitted into the Union on an equal footing with the original states.' Approved June the sixteenth, Anno Domino, nineteen hundred and six."

9. And that the said Constitutional Convention did adopt and the people thereafter ratified the said Constitution by accepting all grants of land and donations made to the said proposed state by the United States under the Enabling Act for the uses and purposes and particularly Section one of Article eleven of said Constitution, in the following language, to wit:

"The state hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act, and any other Acts of Congress, for the uses and purposes and upon the conditions, and under the limitations for which the same are granted or donated; and the faith of the state is hereby pledged to preserve such lands and moneys and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated."

10. The defendants further allege that under and by virtue of the Act of Congress approved May 4, 1894, the Rules and Regulations adopted by the Secretary of the Interior, the Honorable Thomas B. Ferguson, Governor, and William Grimes as Secretary, and L. W. Baxter as Superintendent of Public Instructions, all of the Territory of Oklahoma, constituting the Board for leasing land reserved for school and public buildings in the Territory of Oklahoma, did make and enter into a certain lease contract with one William T. Click on the 8th day of January, 1902, covering the Northeast Quarter of Section Thirty-three (33), Township One (1) South, Range Eight (8) West, and covering a period of time from the first day of January, 1902, to the first day of January, 1905; a copy of said lease contract is hereto attached, made a part hereof and marked defendant's "Exhibit A."

11. That thereafter, on the first day of January, 1905, the Honorable Thomas B. Ferguson, as Governor, William Grimes as Secretary, and L. W. Baxter as Superintendent of Public Instructions, all of the Territory of Oklahoma, as the Board for leasing reserved lands for schools, public buildings and other purposes, for the Territory of Oklahoma, did make, and enter into a certain contract in writing with the said William T. Click under and by virtue of the authority of the Act of Congress approved May 4, 1894, and the regulations of the Secretary of the Interior, whereby they leased to the said Click the said Northeast Quarter ($\frac{1}{4}$) of Section Thirty-three (33), Township One (1) South, Range Eight (8) West, from the first day of January, 1905, to the first day of January, 1908, the said lease being executed on the first day of January, 1905, and on the 12th day of April, 1905, by the respective parties. Copy of said lease is hereto attached, marked "Exhibit B" and made a part hereof.

12. That the said William T. Click entered into possession of the said lands at the time of the execution of said first lease and remained in possession of said land during all the time, and was entitled to, and qualified to receive the benefits of all legislation enacted by the proper authorities concerning said lands. And that upon the passing of the Enabling Act, approved June 16, 1906, the said William T. Click was vested with the Preference Right to purchase at the highest bid without limitation or conditions, the lands hereinafter described, and that upon the adoption of the Constitution, the people of the State of Oklahoma, recognized, and accepted in interest, the Preference Right of purchase of the lands then held by him under lease, at the highest bid.

13. That thereafter, and on the 18th day of July, 1908, the State of Oklahoma, acting by and through the Honorable C. N. Haskell, Governor and Chairman of the Commissioners of the Land Office of the State of Oklahoma; the Honorable L. D. Marr, Secretary of the Land Office of the State of Oklahoma, pursuant to House Bill No. 414, passed by the Legislature of the State of Oklahoma, during its session of 1907-1908, and approved by the Governor, did grant and convey to the said William T. Click an extension certificate extending said lease, "Exhibit B," to the first day of January, 1909, and that the said extension was accepted by the said William T. Click, all as appears by copy of said certificate hereto attached, marked "Exhibit C," and made a part hereof.

14. Defendants further allege that during the term of said extension certificate, "Exhibit C," said William T. Click did sell, transfer, grant and convey his right, title and interest, including the Preference Right of purchase of said lands, to one L. B. DeArman, and that in recognition of the rights of the said L. B. DeArman, and pursuant to the request of the said William T. Click and of the said L. B. DeArman, and as evidence of the rights of L. B. DeArman to the land in question under the lease as aforesaid, the Honorable Board of Commissioners of the Land Office of the State of Oklahoma, acting by and through Honorable Ed. Cassidy, Secretary of said Board, did make, execute and deliver to the said L. B. DeArman an extension certificate evidencing his right in said land which showed said lease, "Exhibit C," to be extended in the name of L. B. DeArman to the first day of January,

1909, copy of said Extension Certificate is hereto attached, made a part hereof and marked "Exhibit D."

15. That pursuant to said transfer from the said William T. Click to the said L. B. DeArman, the said L. B. DeArman became vested with all the right, title and interest under and by virtue of the lease therefor granted by the state to the said William T. Click and under and by virtue of the Enabling Act and the Constitution of the State of Oklahoma, and covering said lands.

16. That thereafter the State of Oklahoma, acting through the Board of Commissioners of the Land Office of the State of Oklahoma, acting under and by virtue of their authority under the law, did make and execute an extension certificate to the said L. B. DeArman, extending the lease to the said L. B. DeArman to the first day of January, 1910. Copy of said Extension Certificate is hereto attached, made a part hereof and marked "Exhibit E."

17. Defendants further allege that on or about the 15th day of October, 1909, the said L. B. DeArman and his wife, Emma DeArman, for valuable consideration, did execute a conveyance of their right, title and interest as lessee to said land to the defendant, William T. Price, upon condition that a good and sufficient lease to said land be executed by the said School Board to the said William T. Price, and caused the same to be filed of record in the office of the Board of Commissioners of the Land Office of the State of Oklahoma. That during the time said L. B. DeArman held the lease on said lands hereinabove described, he occupied said lands and improved the same, and in all respects complied with the laws affecting his right under said lease and to said lands. A copy of said conveyance is hereto attached, made a part hereof and marked "Exhibit F."

Immediately thereafter the said William T. Price and his wife, Ora Price, went into possession of said lands and have at all times since occupied said lands as their homestead and that the said William T. Price was at all times a qualified person to hold a lease upon said lands and to purchase said land under the preference right.

18. That the said defendants, William T. Price and his wife, Ora Price, occupied said lands from the date of said relinquishment until on or about the first day of January, 1913, without any further instrument in writing being exe-

ected between the said Commissioners of the Land Office of the State of Oklahoma and said William T. Price, but that during said time said defendants paid rentals on said land and that the said Commissioners of the Land Office accepted the same and recognized the right of said William T. Price and Ora Price to said land, and the said defendants and their predecessors paid the taxes assessed against said lands from year to year by the State and its various municipalities.

19. That on or about the second day of January, 1913, the State of Oklahoma, acting by the Commissioners of the Land Office of the State of Oklahoma, composed of the Honorable Lee Cruce, Governor of the State of Oklahoma and Chairman of said Board, and J. R. Williams, Secretary of said Board, executed a purported lease in writing to William T. Price, covering a period of time from the first day of January, 1913, to and including the 31st day of December, 1914.

20. That thereafter and on or about the 5th day of March, 1915, the said Commissioners of the Land Office of the State of Oklahoma acting by and through their Secretary, the Honorable G. A. Smith, did make, execute and deliver to the said William T. Price a purported Extension Certificate extending the time of said lease from the 31st day of December, 1914, to and including the 31st day of December, 1915.

21. Defendants further allege that at the time of the passage of the Enabling Act and approval thereof, to wit, on June 16, 1906, and at the time of the adoption of the Constitution of the State of Oklahoma, and for more than ten years thereafter, the said lands hereinbefore described were not known or classed as mineral lands.

22. *Plaintiff* further alleges that by virtue of the provisions of Section 1 of Article 4 of Chapter 49 of the Acts of the Legislature for the Session of 1907-1908, and other acts, the Commissioners of the Land Office of the State were required to set aside such lands as were known to be mineral in character, and to segregate the minerals from the surface use and interest therein.

Said defendants allege and state that said acts if applied so as to segregate the minerals including oil and gas in the lands hereinbefore described so as to deprive the defendants of their Preference Right to purchase said land and all there-

of, would be unconstitutional and void as to them insofar as it attempts to take away from these defendants such Preference Right to purchase said interest. And would be violating the provisions of the Constitution of the United States of America in depriving these defendants of their property without due course of law. That said Section 1 reads as follows:

"When any tract of the school land and other public lands granted to the State of Oklahoma under the Act of Congress known as the 'Enabling Act' is, by the Commissioners of the Land Office of the State, known to contain oil or gas, or where such lands are, by said Commissioners, deemed valuable for oil and gas purposes, such Commissioners shall enter of record in their office, their finding declaring that such oil or gas character exist, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act."

23. That under and by virtue of Article 2 of Section 28 of the Laws of the State of Oklahoma for the year 1909, approved March 2, 1909, the Commissioners of the Land Office of the State of Oklahoma, were directed by the Legislature to dispose of, sell and convey the lands known as indemnity lands in the State of Oklahoma, and Section 33.

24. That acting under the provisions of law, said Commissioners of the Land Office did cause the lands hereinbefore described, together with the other lands in said section and in said vicinity to be appraised according to the terms and requirements of the Enabling Act for sale purposes and the lands hereinbefore described were appraised by three disinterested appraisers, non-residents of the county in which said lands are located, at the sum of _____ dollars, and the improvements were appraised at the sum of _____ dollars.

Defendants further allege that under and by virtue of said appraisement so made, the said Commissioners of the Land Office did advertise and sell the other three quarter sections in said section thirty-three (33) and certain indemnity lands in section thirty-four (34), in the said township and range, and other lands located in the vicinity of the lands in controversy, but wholly failed and neglected to offer for sale the

lands of these defendants, although required by law to do so.

25. Defendants further allege that at the time of said appraisalment the defendants and their predecessors had improved said lands by reducing the same to a high state of cultivation, fencing the same, building a house and barn thereon, setting out and cultivating for a period of four years an orchard of something over four hundred trees and were occupying said lands at said time as they had been therefore as their homestead and with the intention of making said lands their home.

26. Defendants further allege that in disregard of the right of the defendants the said Commissioners although directed so to do by the Legislature of the State of Oklahoma, failed and neglected since 1909, to cause said lands to be advertised and sold as required thereby and that the defendants have at all times been ready, willing and able to do all things required of them by the Enabling Act in order to prove their title to said lands, and that the Commissioners of the Land Office of the State of Oklahoma, in disregard of the right of these defendants under their said lease, and their right to exercise their privilege of buying said land at the highest bid therefor, did on or about the 4th day of January, 1919, make, execute and deliver to the Magnolia Petroleum Company certain oil and gas mining lease which is attached to and made a part of the plaintiff's Amended Petition; said lease was made to the said Magnolia Petroleum Company without any knowledge or consent upon the part of these defendants, or either of them, and without any cancellation or other disposition of the leasehold by the defendants herein on said lands, and without giving to these defendants any preference right to purchase a lease for oil and gas purposes. That the effect of the giving of said lease and development of said land under said lease for oil and gas purposes would be to denude said lands of a very material part of their value, to deprive defendants of the possession of said lands, the use and occupancy thereof and if said plaintiff is permitted to operate under said lease and to drill and operate wells upon said land to the exclusion of the defendants, it would deprive defendants of their preference right to purchase said lands, and will make said land valueless for any purpose except under such oil and gas lease so executed to the plaintiff.

27. That the defendants have valuable rights in and to said lands under their preference right to purchase the same, and under and by virtue of their right to the use and occupancy of the same, and that the making of said lease deprives these defendants of all of said rights without compensation and in violation of the due process under the Constitution of the State of Oklahoma and the Constitution of the United States of America.

28. Defendants further allege that the Resolution set out in paragraph 3 of Plaintiff's Amended Petition as having been passed by the Commissioners of the Land Office of the State of Oklahoma, was made without authority of law, and is of no force and effect. That said Resolution was passed without the knowledge of the defendants or either of them, and without any compensation being allowed defendants for their rights and claims in and to the said lands, and such purported action by the said Board was in direct violation of the instructions and directions made to said Board by law, and by the State of Oklahoma, with respect to the sale and disposition of said lands involved and claimed by defendants. That said resolution deprives defendants of their property without due process of law guaranteed to them under the Constitution of the State and of the United States and impairs and deprives them of the rights granted to them under the Enabling Act.

29. Defendants further allege that any and all acts of said Board of School Land Commissioners and any and all acts of the Legislature that deprives these defendants or either of them from their Preference Right to purchase said lands, or of their rights in said lands as a homestead, does so without compensation and without due process of law.

30. Defendants further deny that the purported oil and gas lease granted plaintiff gives it any rights to the possession of said lands, or any part thereof, and that the purported action of said Board is in direct violation of their duty under the law of which the plaintiff herein is charged with notice and deprived these defendants of their rights in and to said lands guaranteed them under and by virtue of the Constitution of the State of Oklahoma and of the United States.

31. Defendants further allege that at the time of the delivery of the lease and the Extension Certificate thereto, marked "Exhibit A" and "Exhibit C," and attached to plaintiff's Amended Petition, defendants did not thereby surren-

der their Preference Right to purchase said lands, or the homestead character of said lands. That the consideration named in said lease was the rental value of the lands at said time, and no amount was by defendants received as a consideration for the release by defendants of their Preference Right to purchase said lands, and defendants have consistently maintained and claimed their Preference Rights to said lands, and have at all times done all things required by them by law, to hold and perfect their title thereto, and have in good faith at all times maintained their residence as a home thereon, with their family, and cultivated the said lands and built and maintained the permanent improvements thereon. Defendants and each of them have at all times since their purchase of the said rights of the said DeArman to said lands claimed and asserted their Preference Rights to purchase said lands and their homestead rights thereto, and have never at any time surrendered, eliminated, waived or abandoned their said Preference Right to purchase said lands, or their homestead in said lands.

33. Defendants further allege that Section 3, Article IV, Chapter 49, Session Laws 1907-08, is in violation of the provisions of the Enabling Act and of Section 1, Article 11, of the Constitution, accepting the grants of public land by the United States to the State of Oklahoma, in that it attempts to authorize the leasing of all public lands granted to the state without regard to the time of such lease, and for terms in excess of the period fixed by Section 8 of the Enabling Act, and that the oil and gas lease held by the plaintiff was made in violation of the terms of the Enabling Act accepted by the State Constitution, and in violation of the authority given, or attempted to be given by said Section 3, Article IV, Chapter 49, Session Laws 1907-08, if said section be held valid in itself. And said Section 3 and the act of the said Commissioners in executing said pretended lease to plaintiff, if upheld and enforced, violates the Fourteenth Amendment of the Constitution of the United States as to defendants in that it takes and will have the effect of taking defendants' property without compensation and without due process of law.

34. Defendants further allege that Articles III and IV of Chap. 49, Session Laws 1907-08, approved May 26, 1908, together with the revision of said Statutes as found and con-

tained in Article III and IV, Chap. 69, Revised Laws 1910, and all acts amendatory of such original or revised statutes, or which, whether in the form of a revision or amendment, or by new enactment, undertakes to segregate the mineral or oil and gas deposits from the surface uses and interests in Section 33, granted to the State of Oklahoma, by the terms of the Enabling Act, and accepted by Section 1 of Article 1 of the Constitution, for the uses and purposes and upon the conditions, and under the limitations therein contained, and which statutes, or any rule or regulation attempted to be made pursuant thereto, undertake to confer power upon, or to authorize the Commissioners of the Land Office to segregate the minerals, oil and gas deposits on or under such lands from the surface uses and interests therein, and all acts done by the said Commissioners of the Land Office and their officers, agents and employees, or any other officers, agents and employees of the State, acting under or pursuant to such statute, or any purported rules or regulations of such Board of Commissioners, or under color of authority of any statute, rule or regulation and particularly of any statute, rule or regulation, or action of the Commissioners of the Land Office in attempting, on August 26, 1915, as charged in plaintiff's Amended Petition, to declare the land theretofore leased to the defendant, William T. Price, to be valuable for oil and gas purposes and to segregate the oil and gas deposits belonging thereto and forming a part of such lands in their native state, from the surface uses and interest therein, and withdraw the same from sale, as well as to authorize the leasing of such lands, already leased, for oil and gas purposes, and in making and entering into the lease of January 4, 1919, with plaintiff, and through which it claims the right of entry and title to the oil and gas on the lands theretofore leased to defendant as construed and as applied to William T. Price, and the lands to which he was, by law, given the Preference Right of purchase, is repugnant to and violates not only Sections 2, 7, 15 and 23 of Article 11 of the Constitution of the State of Oklahoma, but the Fourteenth Amendment to the Constitution of the United States, in that such statute and all acts done pursuant thereto, or under color of authority thereof, as construed and applied to defendants deprives the defendants of liberty and property without due process of law

and without compensation, and denies to the defendants the equal protection of the laws.

35. And defendants claim the protection of the Constitution of the United States and the Amendments thereto, and particularly the Fourteenth Amendment, and invokes the vested jurisdiction of the Court, and, in due course, of the Supreme Court of Oklahoma, and if necessary, ultimately of the Courts of the United States, for protection of the rights of said defendants and each of them and of their liberty and property in the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west, in Stephens County, and of their equal protection of the laws, and for due process of law.

36. Wherefore, defendants pray judgment and ask that plaintiff take nothing by its suit, and that defendants recover their costs.

THIRD COUNT.

Comes now the defendants and for affirmative relief and as their cause of action against the plaintiff, allege and state:

1. Defendants re-allege all the facts and things pleaded in each paragraph of the second count of this answer and refer to them and make them a part hereof the same as if set out and copied in full in this count.

2. Defendants further allege that the plaintiff claiming under the oil and gas lease attached to its Amended Petition filed this suit and without notice obtained a temporary restraining order against these defendants from the County Judge of Stephens County, Oklahoma, enjoining these defendants from interfering with plaintiff going upon said lands and drilling for and producing oil and gas on said lands. That under said oil and gas lease and with the protection of said restraining order the plaintiff with a large force of men, teams and equipment, came upon said lands and have been continuously coming unto said lands since said order was issued and are continually trespassing on said lands without regard to the defendants' rights, and if said plaintiff is permitted to continue trespassing on said lands they will entirely destroy said lands for any purpose except for the production of oil and gas under plaintiff's purported lease.

3. That since the issuance of said restraining order the plaintiff has drilled on said lands four oil wells which have

and are producing large amounts of oil and gas, the amount thereof being unknown to these defendants, but said defendants allege that said wells have been and are producing 500 barrels each day and that ever since the said wells were brought in, the plaintiff has been appropriating said oil and gas to its own use and has in no manner accounted to defendants therefor.

4. Defendants further allege that the plaintiff has and will continue to mingle said funds derived from said oil and gas with other funds of plaintiff and use the same in payment of its obligations, and dividends to its stockholders, many of whom are not residents of Oklahoma, and has and will continue to pay to the State of Oklahoma fixed royalties as in said lease provided and thereby place said funds and moneys beyond the reach of defendants, and will place all the proceeds from said oil and gas beyond the jurisdiction of this Court.

5. Defendants further ask and demand by reason of these facts, and by reason of the claim of these defendants to these lands, hereinbefore set forth, that the plaintiff account to them for all minerals, oil and gas taken from said lands and pending the final determination of this cause that a receiver be appointed to take charge of said wells on said lands and operate them and hold the proceeds thereof until this cause is finally adjudicated under the control and direction of the court having jurisdiction of this cause, and that plaintiff be enjoined from disbursing said funds and payment of royalties under said lease.

6. Defendants further allege that said oil and gas lease so executed to plaintiff casts a cloud upon the title to said lands and upon the rights of these defendants and each of them in and to the same, and that said lease should be, and defendants ask that it shall be, cancelled and held null and void and of no force and effect.

Wherefore, defendants pray judgment and ask that plaintiff take nothing by its suit, and that defendants recover their cost.

Defendants further ask that the plaintiff's oil and gas lease of date January 4, 1919, be cancelled, set aside and held for naught; that the plaintiff be enjoined from the payment or distribution of the proceeds of any oil or gas extracted or taken from the lands in controversy that may be now in their hands or that may come into their hands hereafter.

That said plaintiffs be required by the judgment of this court to render an accounting for all minerals, oil and gas, extracted or taken from said lands since the date of their entry thereon until the final determination of this cause. That upon presentation to the court that the court render judgment, appoint a receiver to take charge of the wells now on the lands in controversy and operate the same under the direction and control of the court having jurisdiction of this cause.

That defendants be adjudged to have the Preference Right of purchase of said lands and that the defendants and each of them be adjudged to have a homestead interest in said land; and

The defendants pray the judgment of the court for such further and other relief as may to the court seem just and equitable in the premises, and that the defendants recover their costs in this behalf expended.

STEVENS & RICHARDSON,
BLAKE & BOYS,
STUART, SHARP & CRUCE,
Attorneys for Defendants.

STATE OF OKLAHOMA,
Oklahoma County, ss:

I, -----, being first duly sworn, depose and say that I am one of the defendants in the above entitled cause, that I have read the above and foregoing answer and that the facts therein stated are true.

Subscribed and sworn to before me this-----day of
-----1920.

Notary Public.

“EXHIBIT A”

Renewal of Lease—School Land—for 16 and 36 and 13 and 33.

This Indenture, made by and between Thompson B. Ferguson, as Governor, William Grimes, as Secretary, and L. W. Baxter, as Superintendent of Public Instructions, of the Territory of Oklahoma, constituting a board for leasing land re-

served for schools and public buildings in the Territory of Oklahoma, parties of the first part, and William T. Click, party of the second part, witnesseth: That the said parties of the first part, by virtue of the authority vested in them by Act of Congress approved May 4, 1894, and the regulations prescribed by the Secretary of the Interior, therein provided for, and in consideration of the covenants of the said party of the second part hereinafter set forth, have this day lease, to the said party of the second part, the following described school land, to wit: The NE of Section 33, Township 1 S., North of Range 8 W. of the Indian Meridian, in Comanche County, Oklahoma Territory, to have and to hold the same for a term of three years from the first day of January, 1902, to the first day of January, 1905, for which said party of the second part hereby agrees to pay therefor the sum of----- dollars, cash in hand, the receipt whereof is hereby acknowledged, and twenty-five dollars on the 1st day of October, 1902, and twenty-five dollars on the 1st day of October, 1903, and twenty-five dollars on the 1st day of October, 1904.

The said deferred payments are evidenced by three certain joint, several promissory notes of even date herewith, signed by said party of the second part and two sureties for the above amount, due and payable at the time set forth.

The said party of the second part covenants with the said parties of the first part, that he will not cut or remove or permit to be cut or removed any timber from said land; that he will not quarry or remove, or permit to be quarried or removed, any building or other stone from said land, except such as may be necessary for the foundation for buildings thereon; that he will not mine or remove, or permit to be mined or removed, any minerals therefrom, that he is leasing said lands for agricultural purposes and grazing purposes, and that he will cultivate the same in a husbandlike manner; that he will not assign this lease, or underlet any portion of the leased premises, and that he will not commit any acts of waste upon or to said land.

It is further agreed by and between the parties to this lease that the said party of the second part may, at the expiration of the time for which this lease is made, remove any or all of the improvements he may have placed upon said land, unless the said party of the second part shall be in default

for payment of said rental, or a part thereof, or has violated any of the conditions herein.

If default is made in the payment of the said rental, or the conditions of this lease have been violated, the improvements upon said land, and the growing crops thereon, shall not be removed by the said party of the second part, or any one claiming under him, until such rental has been fully paid, together with interest, costs, damages, and attorney's fees arising from the violation of the conditions of this lease, and such unpaid rental, interest, costs, damages and attorney's fees aforesaid, shall become a lien upon the improvements or growing crops on said land, and the improvements or growing crops may be sold at public or private sale by the said parties of the first part, or their successors in office, without notice to the said party of the second part, and the proceeds of such sale applied to the satisfaction of the unpaid part of said rental, and in satisfaction of damages, interest, costs, and attorney's fees as aforesaid.

It is hereby expressly understood by and between the parties to this lease that upon the non-payment of said rentals or any part thereof at the time the same shall become due and payable, or upon the failure or refusal of the said party of the second part to furnish additional security for any deferred payments, when requested so to do, by the said parties of the first part, or their successors in office, or if the said party of the second part shall fail in any manner to comply with the provisions of this lease, or violate any of the conditions thereof, the said parties of the first part or their successors in office, may, at their option, declare this lease forfeited, and the said parties of the first part or any other person, lawfully entitled to the possession thereof on behalf of, or representing the United States, or the Territory of Oklahoma, shall have the right to take immediate and peaceable possession of said premises, together with the improvements and growing crops thereon situated. And upon the termination of this lease, either by the expiration of the time for which the lease is made, or by reason of the violation of any of the conditions hereinbefore set forth, any instrument in writing, signed by the said parties of the first part, or their successors in office, showing that the person or officer named therein is entitled to the possession of the land or that he takes pos-

session of the improvements and growing crops thereon on behalf of the United States or the Territory of Oklahoma, shall be sufficient authority for such person or officer to take possession of the land, and to take possession of, and sell the improvements and growing crops thereon, for the purpose of paying any part of said rental due and unpaid, with interest, costs, damages and attorney's fees, as hereinbefore provided for.

If the party of the second part desires to re-lease said land at the expiration of the time for which this lease is made and files his application therefor with the said parties of the first part, or their successors in office, when ever PUBLIC NOTICE is given that the bids will be received, and has complied with all the conditions herein, he will be given a preference right to re-lease said land at the appraised rental value thereof as fixed by the Board of Leasing School Lands, but the right is reserved by the said parties of the first part to reject all bids.

If, at any time after the execution of this lease, it is shown to the satisfaction of the parties of the first part, or their successors in office, that there has been any fraud or collusion upon the part of the party of the second part to obtain this lease at a less rental than its value, it shall be null and void at the option of the parties of the first part.

Executed in duplicate.

Witness the hands and seals of the parties aforesaid this 8th day of June, '02.

T. B. FERGUSON,
Governor.

[SEAL]

WILLIAM GRIMES,
Secretary.

[SEAL]

L. W. BAXTER,
Superintendent of Public Instruction.

Witness: J. R. Gates, Jr., W. R. Green. Endorsed: Lease No. 21053.

Lease: From Thompson B. Ferguson, Gov., William Grimes, Secretary, L. W. Baxter, Superintendent of Public Instruction. To: William T. Click, P. O. Comanche. Expires: January 1, 1905. Application No. 16719. T. G. Payment No. \$2.00, Cash payment No. 115, \$105.00. Excess.

EXHIBIT "B"

Lease for Territorial School Land

This indenture, made by and between Thompson B. Ferguson, as governor, William Grimes, as Secretary, and L. W. Baxter, as Superintendent of Public Instructions of the Territory of Oklahoma, and constituting a board for the leasing of land reserved for schools, public buildings and other purposes, in the Territory of Oklahoma, parties of the first part, and Wm. T. Click, party of the second part, Witnesseth:

That the said parties of the first part, by virtue of the authority vested in them by an act of Congress approved May 4, 1894, and the regulations prescribed by the Secretary of the Interior, therein provided, for, and in consideration of the covenants of the said party of the second part hereinafter set forth, have this day leased to the said party of the second part the following described school or other reserved land to wit:

The NE $\frac{1}{4}$ of Section 33, Township 1 South of Range 8 West of the Indian Meridian in Comanche County, Oklahoma Territory, to have and to hold the same for a term of three years from the First day of January, 1905, to the First day of January, 1908, for which said party of the second part hereby agrees to pay therefor the sum of-----Dollars, cash in hand, the receipt whereof is hereby acknowledged, and Forty six dollars on the first day of October, 1905, and Forty six dollars on the first day of October, 1906, and Forty six dollars on the first day of October, 1907.

That said deferred payments are evidenced by 3 certain joint, several promissory notes of even date herewith, signed by said party of the second part and two sureties for the above amount, due and payable at the time above set forth.

The said party of the second part covenants with the said parties of the first part, that he will not cut or remove, or permit to be cut or removed, any timber from said land; that he will not quarry or remove, or permit to be quarried or removed, any building or other stone from said land, except such as may be necessary for the foundations for buildings thereon; that he will not mine or remove, or permit to be mined or removed, any minerals therefrom; that he will cultivate the same in a husbandlike manner; that he will not assign this

lease, or underlet any portion of the leased premises (without a permit) and that he will not commit any acts of waste upon or to said land.

It is further agreed, by and between the parties to this lease that the party of the second part may at the expiration of the time for which this lease is made, remove any or all of the improvements he may have placed upon said land, unless the said party of the second part shall be in default for payment of said rental, or any part thereof, or has violated any of the conditions herein.

If default is made in the payment of said rental, or the conditions of this lease have been violated, the improvements upon said land, and the growing crops thereon shall not be removed by the party of the second part, or any one claiming under him, until such rental has been fully paid, together with interest, costs, damages, and attorney's fees aforesaid, and shall become a lien upon the improvements on said land and the growing crops thereon, and such improvements and growing crops may be sold at public or private sale by said parties of the first part, or their successors in office, without notice to the said party of the second part, and the proceeds of such sale applied to the satisfaction of damages, interest, costs, and attorney's fees as aforesaid.

It is hereby expressly understood by and between the parties to this lease, that upon the non-payment of said rental or any part thereof at the time the same shall become due and payable, or upon the failure or refusal of the said party of the second part to furnish additional security for any deferred payments when requested so to do by the said parties of the first part, or their successors in office, or if the said party of the second part shall fail in any manner to comply with the provisions of this lease, or shall violate any of the conditions thereof, the said parties of the first part, or their successors in office, may at their option, declare this lease forfeited, and the said parties of the first part and any other person lawfully entitled to the possession thereof on behalf of, or representing the United States, or the Territory of Oklahoma, shall have the right to take immediate possession of said premises, together with the improvements and growing crops thereon situated, and upon the termination of this lease, either by the expiration of

the time for which this lease is made, or by reason of the violation of any of the conditions hereinbefore set forth, any instrument in writing, signed by the said parties of the first part, or their successors in office, showing that the person or officer named therein is entitled to the possession of the land, or that he takes possession of the improvements or growing crops thereon, on behalf of the United States or the Territory of Oklahoma, shall be sufficient authority for such person or officer to take possession of the land, and to take possession of and sell the improvements and growing crops thereon, for the purpose of paying any part of said rental due and unpaid, with interest, costs, damages and attorney's fees, as hereinbefore provided for.

If the party of the second part desires to release said land at the expiration of the time for which this lease is made and files his application therefore with the said parties of the first part, or their successors in office, whenever PUBLIC NOTICE is given that the bids will be received, and has complied with all the conditions herein he will be given a preference right to re-lease said land at the appraised rental value thereof as fixed by the board for leasing School lands, but the right is reserved by the said parties of the first part to reject all bids.

If, at any time after the execution of this lease, it is shown to the satisfaction of the parties of the first part, or their successors in office, that there has been any fraud or collusion upon the part of the said party of the second part to obtain this lease at a less rental value than its value, it shall be null and void at the option of the parties of the first part.

Executed in duplicate.

Witness the hands and seals of the parties aforesaid this 1st day of January, 1905.

Attest to signatures of Members of the Board:

T. B. FERGUSON,

Governor.

WILLIAM GRIMES,

Secretary.

L. W. BAXTER,

WM. T. CLICK,

Lessee.

FRED WENNER,

Secretary of the Board.

[SEAL]

[SEAL]

[SEAL]

Before me on this 12th day of April, 1905, personally appeared Wm. T. Click, who executed the within and foregoing instrument as his free and voluntary act and deed.

Subscribed and sworn to before me the above day and date.

W. H. ADAMS, *Notary Public*.

My Commission expires Nov. 19, 1907.

Endorsed: Lease No. 34911. Lease: from Thompson B. Ferguson, Governor, William Grimes, Secretary, L. W. Baxter, Supt. of Public Instruction, to Wm. Click, P. O. Comanche, I. T. Expires January 1, 1908. Application No. 26212. T. C. Payment No. ——— \$2.00, Cash Payment No. ——— \$ ———.

EXHIBIT "C"

EXTENSION CERTIFICATE

Renewal of Lease

Whereas, on the 1st day of January, 1905, the Territorial Board of Leasing School Lands executed a lease to Wm. T. Click, for the following described lands, situated in Stevens County, to wit:

NE 33-18-8W.

said lease expiring on the 1st day of January, 1908, and said lessee did make application and is entitled to a renewal thereof, and

Whereas, the Legislature of the State of Oklahoma, passed an act known as House Bill No. 414, which provides that all leases upon school lands expiring between December 25th, 1907, and April 15th, 1908, are extended without further action of the Commissioners of the Land Office of the State of Oklahoma, until January 1st, 1909.

This, then, certified that the said lease above described is hereby extended to the first day of January, 1909, and a consideration for the extension thereof, and as rent for the said described lands for the said period the said lessee binds and obligates himself to pay to the State of Oklahoma the sum of forty-six (\$46.00) dollars in the following manner:

Cash in hand, receipt of which is hereby acknowledged.

One certain promissory note of this date, executed by said lessee as principal and two persons, residents of said State as sureties.

In witness whereof, the said Commissioners of the Land Office have caused this certificate of extension to be executed in duplicate by C. N. Haskell, Governor of the State of Oklahoma, as Chairman of the Commissioners of the Land Office, and attested by L. D. Marr, Secretary to the Commissioners of the Land Office, this 18th day of July, 1908.

C. N. HASKELL,
Governor and Chairman of the Commissioners of the Land Office.

Attest:

L. D. MARR,
Secretary to the Commissioners
of the Land Office.

I, W. T. Click, the above nemed lessee, do hereby accept such extension under the conditions above stated.

In witness whereof, I have hereunto affixed my signature on this 20th day of July, 1908.

W. T. CLICK, *Lessee*.

Witnesses to signature: Geo. T. Burk, E. R. Lambdin.

Endorsed:

No. 51119. Extension Certificate. Renewal of Lease. From the Commissioners of the Land Office, State of Oklahoma, to Wm. T. Click, Postoffice, Comanche, No. 3.

Expires January 1st, 1909. Application No. 37431. T. C. payment No. ———\$1.00. Cash payment No. ———\$———.

EXHIBIT "D"

Guthrie, Okla., 1-1-1905.

This is to certify that the lease executed by the Territorial Board of the Territory of Oklahoma for Leasing School Lands, as lessor, and Wm. T. Click, of _____lessee, upon the following described land, to wit, NE $\frac{1}{4}$, Sec. 33-18-8W, Stephens and which lease expires on January 1, 1908, is extended to the first day of January, 1909, without further action, under Chapter 49, Article 2, Laws of 1907-08, which provides as follows:

Sec. 1. "All leases expiring between December 25, 1907, and April 15, 1908, are extended without further act of the Commissioners of the Land Office until January 1st, 1909, in all cases where lessees desire extension * * * *

and that on the 18th day of Aug., 1908, said lessee relin-

quished his interest in and to said lease and lands to L. B. DeArman, Duncan.

And that on the ____ day of _____ 19____, said _____
_____relinquished his interest in and to said lease and lands
to _____.

And that said last named person is the lessee of said land.

In witness whereof, I have hereunto affixed my official signature this 31st day of December, 1908.

ED. CASSIDY,

*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

N. B. Lessee can transfer or assign his lease by surrendering the duplicate lease which expired January 1st, 1908, and this certificate accompanied by the proper remittance. In the event that the duplicate lease has been surrendered on a previous transfer, lessee can transfer or assign by the surrender of this certificate.

EXHIBIT "E"

Extension Certificate

Whereas, on the 1st day of Sept., 1908, the proper authorities having charge of the leasing of the school lands now belonging to the State of Oklahoma, entered into a written lease with L. B. DeArman, for the following described lands situate in Stephens County, to wit:

NE $\frac{1}{4}$ Sec. 33-1S-8W

Whereas, under and by virtue of the terms thereof and the laws of the State of Oklahoma, said lease expired on the first day of January, 1909, and,

Whereas, it is provided under the terms of said lease that the said lessee has the non-competitive preference right to renew the same subject to the laws of the State of Oklahoma, and,

Whereas, on the 30th day of April, 1909, the Commissioners of the Land Office of the State of Oklahoma, who have, under and by virtue of the Constitution of the said State, charge of the sale, rental, disposal and management of the school lands and other public lands thereof, did by Resolution, properly adopted direct the Secretary to said Commission to proceed to collect rents for the school lands of the State for the current year on the same basis as the last preceding year.

This, then, is to certify that the said lease above described is hereby extended to the first day of January, 1910, such extension being made subject to all the laws of the State of Oklahoma, which are now or may hereafter become in force or effect or which may hereafter be passed, and as a consideration for this extension and as rent for said described land for the period beginning on January 1st, 1909, and ending upon the 31st day of December, 1909, the said lessee binds and obligates himself to pay to the Commissioners of the Land Office of the State of Oklahoma, the sum of forty-six dollars in the following manner:

One certain promissory note of this date executed by said lessee as principal, and two persons, resident of said state, as sureties.

This certificate is issued in duplicate.

In witness whereof, I have hereunto affixed my official signature as the duly acting and qualified Secretary to the Commissioners of the Land Office of the State of Oklahoma, at the City of Guthrie, in said State, on this day of May 12, 1909.

ED. CASSIDY,

*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

I, L. B. DeArman, the above named lessee, do hereby accept such extension under the terms and conditions of the lease above stated.

In witness whereof, I have hereunto affixed my signature this 17th day of June, 1909.

L. B. DeARMAN.

Witnesses to signature, H. F. Dunn, T. N. Moody.

Endorsed: T-20783. No. 57667. Extension Certificate from Commissioners of the Land Office of the State of Oklahoma, to L. B. DeArman, postoffice, Duncan. Expires December 31, 1909. Application No. 38548. T. C. Payment No. ————\$2.00. Cash payment No. ————\$———.

EXHIBIT "F"

Relinquishment.

I, L. B. DeArman, being the lessee under a lease from the Board of Leasing School Lands, and which lease covers the

following described land, to wit, the Northeast Quarter Section No. 33, Township One South of Range Eight West.

Do hereby relinquish all my right, title and interest under said lease to the land above particularly described, to the Board for Leasing School Lands, upon the condition that a good and sufficient lease to this land be executed to William T. Price, a qualified lessee, being the head of a family whose postoffice address is Comanche, Okla.

And being duly sworn, upon my oath declare that no timber has been cut upon, nor any rock, sand or mineral removed from the said land during the term of my lease without a permit from the Board for Leasing School Lands and for which the State has not been paid for.

L. B. DeARMAN, *Lessee*.

Subscribed and sworn to before me this 15th day of October, A. D. 1909.

R. E. CAMPBELL, *Notary Public*.

My Commission expires Dec. 29, 1912.

I, Emma DeArman, wife of L. B. DeArman, the lessee of the Northeast Quarter of Section 33, Twp. One South of Range 8 West, hereby concur in the above relinquishment, waiving all my rights in said lease.

EMMA DeARMAN.

STATE OF TEXAS,

County of Baylor.

On this 18th day of October, 1909, personally appeared before me, Emma DeArman, known to me to be the wife of L. B. DeArman, and the identical person who signed the above instrument and acknowledged to me the execution of the same to be her voluntary act and deed for the purposes therein set forth.

D. L. KENAN.

My Commission expires June 1st, 1911.

Endorsed: No. 2885. Answer to Amended Petition. Filed November 18th, 1920. G. A. Witt, Court Clerk.

That thereafter, to wit, there was filed in said cause by the plaintiff a Receipt of a copy of said Answer to said Amended Petition and consent that the same be filed out of time, which said receipt and consent, being in words and figures as follows, to wit:

STATE OF OKLAHOMA,
Stephens County.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association;
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, as Trustees, Plaintiff.

vs.

WILLIAM T. PRICE and ORA PRICE, his wife, Defendants.

In the District Court.

Receipt is hereby acknowledged of a copy of the answer and exhibits thereto, in the above entitled cause, and we hereby consent to the filing of such answer out of time.

BLAKENEY & MAXEY,
Attorneys for Plaintiff.

Endorsed: No. 2885. Filed in the District Court, November 18th, 1920. G. A. Witt, Court Clerk.

That thereafter, to wit, there was filed in said cause by the State of Oklahoma, a Petition of Intervention; which Petition of Intervention so filed is in words and figures as follows, to wit:

In the District Court in and for Stephens County, State of Oklahoma.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, Trustees, Plaintiffs.

vs.

WILLIAM T. PRICE and ORA PRICE, his wife, Defendants.

No. _____

Notice.

To Stuart, Sharp & Cruce and Blake, Boys & Shear,
Attorneys for the above named defendants.

You are hereby notified that the State of Oklahoma on the relation of the Commissioners of the Land Office of the State of Oklahoma will, on the 23rd day of December, 1920,

present its application to the above court for permission to file herein an interplea on the behalf of said State of Oklahoma on the relation of the Commissioners of the Land Office, a copy of which interplea is herewith handed to you.

S. P. FREELING,
Attorney General, State of Oklahoma.

GEO. E. MERRITT,
Law and Executive Clerk.

We hereby acknowledge service of the above notice and acknowledge a receipt of a copy of the state's interplea in the above entitled action.

STUART, SHARP & CRUCE,
BLAKS & BOYS,
Attorneys for Defendants.

December 13, 1920.

STATE OF OKLAHOMA,
Stephens County, ss.:

In the District Court in and for Said County and State.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, Trustees, Plaintiffs.

vs.

WILLIAM T. PRICE and ORA PRICE, his wife, Defendants.

STATE OF OKLAHOMA, *Ex rel.* Commissioners of the Land Office of the State of Oklahoma, and *Ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, Intervenor.

No. ———

Petition of Intervention.

Comes now the State of Oklahoma, *ex rel.* the Commissioners of the Land Office of said State, and *ex rel.* S. P. Freeling, Attorney General of said State, George E. Merritt, Law and Executive Clerk of the Commissioners of the Land Office of Oklahoma, and, complaining of the plaintiff and defendants in the above entitled action, for cause of action herein alleges and says:

That the State of Oklahoma, by virtue of the Enabling Act, creating the State of Oklahoma, and the ordinance accepting the terms of such Enabling Act, and the Constitution of said State, is the owner of the following described real estate, situate in Stephens County, Oklahoma, to wit:

The Northeast Quarter of Section 33, Township 1 South, Range 8 West.

Intervenor further alleges that, pursuant to House Bill No. 414, Article 2, of the Session Laws of 1907-08, the Commissioners of the Land Office proceeded to appoint appraisers, and which said appraisers, as soon as practicable, proceeded to appraise all of the lands granted to the State of Oklahoma, for educational and public building purposes, and did appraise the above described tract of land and file their report in the office of the Commissioners of the Land Office.

Intervenor further alleges that, pursuant to Senate Bill No. 1, Article 2 of Chapter 28 of the Session Laws of 1909, which authorized the Commissioners of the Land Office to sell and convey the school and other public lands of the State of Oklahoma upon the appraisalment for the year 1908, the Commissioners of the Land Office notified the defendant William T. Price, the lessee then in possession of the above described lands, of the appraised value of his improvements, and the said defendant, William T. Price, being dissatisfied with the appraised value of his improvements, did notify the Commissioners of the Land Office of his dissatisfaction therewith; whereupon the said land covered by said lease contract with the said William T. Price was reserved from sale pending a review of said appraisalment.

Intervenor further alleges that on the date said appraisalment was made one William T. Cick was the lessee of record of said tract of land and in possession of the same; that during the interval between the date of said appraisalment of 1908 and the date of notifying the lessee of the above described lands of the appraised value of his improvements, that the defendant, William T. Price, by proper relinquishment and extension certificates, became the agricultural lessee of said lands.

Intervenor further alleges that the said lands above described were leased lands, and the said defendant Price was the lessee of same, and that the said Price did not at any

time or has not at any time presented an application or petition for the sale of the said lands, and has not at any time presented a petition to the Commissioners of the said Land Office asking for a sale of the said tract so leased to him.

Intervenor further alleges that on the 26th day of August, 1915, the said Price was in possession of the said tract and holding the same as an agricultural lessee, as provided by the laws of said State, a copy of which said lease is attached to the plaintiffs' Amended Petition, and here referred to and made a part of this petition of intervention, and that on the said date the Honorable Commissioners of the Land Office, acting under the provisions of Senate Bill No. 338, Session Laws of 1907-08, determined that the said land was known to contain oil or gas and was deemed valuable for oil and gas purposes, and did enter of record in their office their finding declaring that such oil and gas character exists, and that the same was valuable for oil and gas purposes, and further declaring that the oil and gas deposits were segregated from the surface use and interest therein, and such segregation of such deposits did conclusively withhold the same from sale, lease or other alienation, except as provided by the said Senate Bill No. 338. A copy of said order of segregation is incorporated in the plaintiffs' Amended Petition, and is hereby referred to and made a part of this petition of intervention.

Your intervenor further alleges that immediately after such segregation it proceeded to advertise and sell a lease upon the said land for oil and gas purposes, and on the 20th day of November, 1918, caused notice to be duly given for sealed bids for the leasing of the said tract of land for oil and gas purposes, subject to a one-eighth royalty reserved to the State, and that on the 31st day of December, 1918, the Magnolia Petroleum Company filed its sealed bid, offering to pay a bonus of \$8,000.00 for an oil and gas lease on said tract of land, and the said bid being duly opened, the consideration of the same was continued until January 4, 1919, and that at a regular session of the said Commissioners of the Land Office, held on the 4th day of January, 1919, the said bid of the Magnolia Petroleum Company was duly accepted and a lease ordered issued therefor to the said plaintiff in this action. And that thereafter, to wit, on the said 4th day of January, 1919, the

said Commissioners of the said Land Office of the State of Oklahoma, by R. L. Williams, Governor and Chairman of said Board, attested by A. M. McKinney, Secretary of the Commissioners of the Land Office, did execute an oil and gas mining lease to the said Magnolia Petroleum Company, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly and George C. Greer, as Trustees, a copy of which said lease is attached to plaintiffs' Amended Petition and here referred to and made a part hereof.

Your intervenor further alleges that the said defendant Price was the owner of an agricultural lease upon said tract of land and had no right to and was not possessed of any right, title or claim to the oil and gas under said premises, or any part thereof, and held his agricultural lease upon the said premises subject to the rights of the State and the State's lessee mining the said premises for oil and gas or other minerals.

Intervenor further alleges that under and by virtue of the provisions of the said lease, made with the said plaintiff, that it is entitled to one-eighth of the oil or gas produced by and under said royalty interest.

Intervenor further alleges that the interference by the said defendant with the plaintiff in said cause, in the entering upon the said premises to drill wells, discover and produce oil and gas, prevents the State of Oklahoma, intervenor herein, from receiving its royalty, as in said lease provided, and is thereby causing the said intervenor irreparable injury and damage; that many wells are being drilled in the immediate territory surrounding the said tract, and the said tract will be drained of large quantities of its oil and gas, unless same is properly developed. The extent of such drainage cannot be ascertained or determined.

Intervenor hereby adopts as a part of this petition in intervention all of the allegations of plaintiffs' Amended Petition and exhibits attached thereto, and makes the same a part hereof as though fully re-written herein.

Intervenor alleges that under the laws of said State the intervenor is the one entitled to all the oil and gas produced from said tract, except so far as same may be granted under the terms and conditions of the oil and gas mining lease made to the plaintiff herein, and that the defendants have no interest

in any such oil or gas, and are unlawfully and wrongfully asserting any claim thereto, and unlawfully and wrongfully attempting to prevent the intervenor and its lessee, the plaintiff herein, from developing and producing such oil and gas.

Intervenor further alleges that the said plaintiff, as provided by the laws of said State, has executed a bond and filed the same with the Secretary to the Commissioners of the said Land Office, as required by law, by the terms and conditions of which the said plaintiff stipulated and agreed to pay any damages that may be suffered by the said defendant by reason of entering upon the said tract for the purpose of producing oil and gas, and that the amount so owing to the defendants, damages to their surface and agricultural rights, ought to be ascertained and determined, and the plaintiff be required to pay said amounts to the defendants, as by law provided.

Wherefore, intervenor prays that the said defendants, and each of them, be enjoined from in any wise interfering with the intervenors and its lessee, the plaintiff herein, in the operation of the said premises for oil and gas, and the development of the oil and gas therein, and the production thereof, and that their claim to any of the oil or gas produced therefrom be adjudged unfounded and invalid, and that the intervenor be adjudged and decreed to be the owner of all oil, gas and other mineral rights therein, subject to leases now made by the said Commissioners or hereafter to be made, under the terms and provisions of the laws of said State, and for such other and further relief as under the premises the intervenor is entitled to, and for costs.

S. P. FREELING,
Attorney General of the State of Oklahoma.

GEO. E. MERRITT,
Law and Executive Clerk.

STATE OF OKLAHOMA,
Oklahoma County, ss.:

George E. Merritt, being duly sworn, deposes and says that he has read the above and foregoing petition of intervention and that the allegations thereof are true as he verily believes.

GEO. E. MERRITT.

Subscribed and sworn to before me this 13 day of December, 1920.

RUTH QUEENAN, *Notary Public.*

My Commission expires March 29, 1924.

[SEAL]

Endorsed: No. 2885. Petition of Intervention. Filed in District Court Dec. 3, 1920. G. A. Witt, Court Clerk.

That thereafter, to wit, on the 3rd day of March, 1921, there was filed in said cause an Answer to the Petition for Intervention, which said answer so filed is in words and figures as follows, to wit:

STATE OF OKLAHOMA,
Stephens County.

In the District Court.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, Trnstees, Plaintiffs,
vs.

WILLIAM T. PRICE and ORA PRICE, his wife, Defendants.

STATE OF OKLAHOMA, Intervenor.

Case No. 2885.

Answer to Petiiton for Intervention.

Come now the defendants and each of them and for answer to the petition of intervenors filed upon part of the State of Oklahoma, allege and state:

1. That pursuant to the stipulation made between the parties in said action said defendants file their amended answer to the petition of plaintiffs as their answer to the petition of intervention by the State of Oklahoma, and make the same a part hereof as though fully set out herein in so far as the same may be applicable to the said petition of intervention.

2. Defendants deny each and every allegation contained in the said petition of intervention except such allegations as are alleged to be true in said amended answer and admitted to be true herein.

3. Defendants admit that the State of Oklahoma have recognized defendant William T. Price as the lessee of the lands involved from and prior to the first appraisalment made by the State of Oklahoma for sale purposes in January, 1909, and until this date.

4. Defendants specifically deny that they did anything that warranted the Commissioners of the Land Office in reserving said lands from sale or refusing to sell the same and allege that the appraisalment of 1909 was duly and regularly approved by the Commissioners and that the defendants at no time availed themselves of the right under the law to appeal from said appraisalment and that said appraisalment became final and conclusive between the parties.

5. Defendants further allege that subsequent thereto and in 1915, said land again was appraised for said purposes and that said appraisalment was accepted by the defendant William T. Price, and that said appraisalment became final and no appeal was taken by the said defendants from said appraisalment.

6. Defendants further state that by reason of the neglect and failure of the Commissioners of the Land Office, the intervenors herein, to sell the land as provided by law and at the time provided by law that the defendants are entitled to relief against said Commissoiners, adjudging the defendant, William T. Price, to be the equitable owner of the land in controversy and entitled to a certificate of purchase thereto, and that defendants hereby offer and tender in court, if it should be adjudged by the court that the defendants should do so, the rental on said land for the year 1926, which matured in October, 1920, during the pendency of this action, and the defendant further allege that they are ready, willing and able to purchase said land and offer and tender to pay in court such amounts of the purchase price as the court may determine to be just and equitable in the premises.

Wherefore, defendants pray the judgment of the court according to the prayer of the amended answer filed herein, and further pray that they be adjudged to be the equitable owners of said land and the right to purchase said land

and for such other and further relief as to the court may deem just and equitable.

STUART, SHARP & CRUCE,
STEVENS & RICHARDSON,
BLAKE & BOYS,

Attorneys for Defendants.

Endorsed: No. 2885. Filed in District Court Mar. 3, 1921.
G. A. Witt, Court Clerk.

That thereafter, on the 3rd day of March, 1921, the intervenor filed a motion to strike, which said motion is in words and figures the same as the motion of plaintiff, and the court being fully advised in the premises, overrules said motion, to which the intervenor excepted, and thereafter, on the said 3rd day of March, 1921, the intervenor filed its demurrer, which said demurrer was in words and figures the same as the demurrer filed by the plaintiffs herein, to the defendants' answer to the amended petition of plaintiffs, and the court being fully advised in the premises overrules the said demurrer, to which the intervenor at the time excepted.

That thereafter, to wit, on March 3rd, 1921, there was filed in said cause a Reply by the plaintiff to the Defendants' Answer herein, which Reply is in words and figures as follows, to wit:

In the District Court in and for Stephens County, State of Oklahoma.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association,
Jolin Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE and ORA PRICE, his wife, Defendants.

No. ———

Reply.

Comes now the plaintiff in the above entitled action and for its reply to the defendants' answer herein, alleges and says:

That it denies each, every and all of the allegations in said answer contained, and denies specifically that the said W. T. Price has any preference right to purchase said lands.

WOMACK & BROWN,

B. B. BLAKENEY,

S. W. HAYES,

Attorneys for Plaintiff.

Endorsed: No. 2885. Filed in District Court Mar 3, 1921.
G. A. Witt, Court Clerk.

That thereafter, to wit, on March 3rd, 1921, there was filed in said cause by the Intervenor, State of Oklahoma, a Reply to the answer of the defendants, which said reply is in words and figures as follows, to wit:

In the District Court in and for Stephens County, State of Oklahoma.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE and ORA PRICE, His Wife, Defendants.

No. ———

Reply.

Comes now the intervenor in the above entitled action and for its reply to the defendants' answer herein, alleges and says:

That it denies each, every and all of the allegations in said answer contained, and denies specifically that the said W. T. Price has any preference right to purchase said land.

GEO. E. MERRITT,

*Attorney for the Commissioners
of Land Office.*

Endorsed: No. 2885. Filed in District Court Mar 3, 1921.
G. A. Witt, Court Clerk.

STATE OF OKLAHOMA,
Stephens County, ss.:

In the District Court of Stephens County, State of Oklahoma.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly, and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE and ORA PRICE, His Wife, Defendants.

No. 2885.

Transcript of Stenographer.

Be it remembered that on this 3rd day of March, 1921, the above entitled cause came on for hearing before the Court and the plaintiff appearing by its attorneys, B. B. Blakeney, S. W. Hayes and Womack & Brown, and the defendants, William T. Price and Ora Price, appearing in person and represented by their attorneys, Blake & Boys, Stevens & Richardson and W. C. Stevens, and the State of Oklahoma, Intervenor herein, appeared by Geo. E. Merritt, and all parties announcing ready for trial, the court proceeded to hear the matter, and upon said hearing there was introduced the following evidence as follows, to wit:

Mr. Blakeney: Leave of court being had the State of Oklahoma, on the relation of the Commissioners of the Land Office, files Amended Petition of Intervention in this case.

Mr. Blakeney: It is agreed by the parties hereto that the answer filed to the petition, or amended petition, of the plaintiff, may be refiled and considered as an answer to the petition of intervention.

And thereupon the State asks leave to file motion, to adopt the motion filed to defendants' answer, which is overruled and to which the State excepts.

The State files a demurrer to the answer, which is overruled and exceptions allowed.

And the State thereupon files a demurrer in tenor, same as demurrer of plaintiff and the same is overruled, to which

the State excepts and exceptions allowed. And the State files its reply, which is a general denial.

Defendants ask leave to file their supplemental and additional answer to the petition of intervention.

Plaintiff asks to file its reply, which is a general denial.

Mr. Blakeney: Let the record also show that Judge Sam W. Hayes appears as co-counsel in the case for plaintiff.

Mr. Blakeney: Let the record show the stipulations, as to part of the facts, is filed in this case.

Mr. Blakeney: Plaintiff now offers in evidence paragraph one (1) of the stipulations, which read as follows:

That plaintiff is a joint stock association organized under the laws of the State of Texas and licensed to do business in the State of Oklahoma, engaged in the petroleum oil and gas industry, including production, transportation, refining and marketing thereof. That a copy of said Trust agreement is hereto attached, hereby referred to and for the purpose of identification marked "Exhibit A." We now offer Exhibit "A" in evidence.

Mr. Boys: Defendants object to the introduction of Exhibit "A" for the reason that the action of the Commisisoners of the Land Office, in executing such a contract was in violation of the rights of the defendants and without his consent and was an effort on their part to take the property of these defendant without process of law and is in violation of his constitutional rights and for the reason it is irrelevant, incompetent and immaterial as to these defendants.

Court: Overruled. Defendants excepts.

capital stock of said Company is \$20,000,000.00, that it proposes to invest or employ in the transaction of its business in the State of Oklahoma, not to exceed the sum of \$3,500,000.00 of its capital, at this time, and that the remainder or a greater amount of its capital will not be used in connection with its business within the State without further notice and payment of the proper admission fees.

Vice-President of the Magnolia Petroleum Company.

Subscribed and sworn to before me, a Notary Public, in

and for the aforesaid County and State this the 6th day of January, 1916.

Notary Public.

Mr. Blakeney: We offer in evidence paragraph two (2) of the stipulations, which reads as follows:

That defendants are husband and wife, and with their family are residing and were so residing at and prior to the commencement of this action, upon the lands involved in this controversy, to wit: The Northeast Quarter ($\frac{1}{4}$) of Section Thirty-three (33), Township One (1) South, Range Eight (8) West of the Indian Meridian, lying and situate in Stephens County, Oklahoma.

Mr. Blakeney: We offer in evidence paragraph Ten (10) of the stipulations, which reads as follows:

That on the 4th day of January, 1919, the Commissioners of the Land Office of the State of Oklahoma, by the Governor and the plaintiff by its agent, H. W. Williams, executed the contract, copy of which is attached to plaintiff's petition and marked "Exhibit A," (Record p. 47), and a copy of which is attached hereto, marked "Exhibit "F" (Record p. 57), for purposes of identification, hereby referred to and made a part hereof. That at said time the said defendants were in possession of said premises as aforesaid and refused plaintiff access to said lands, and possession of all or any part thereof denied aid plaintiff any right to enter upon, explore, exploit or develop the minerals in said land under the contract "Exhibit F (Record p. 57) herein, and thereupon the plaintiff instituted this action and the proceedings in this action were thereafter done and performed.

Defendants object to introduction of said Exhibit "A" attached to plaintiff's amended petition, as being incompetent, irrelevant and immaterial and as being in violation of their rights guaranteed by the Constitution and Laws of Congress.

Overruled. Defendants except.

We desire to introduce in evidence paragraph Eleven (11) of the stipulation, which reads as follows:

That theretofore, to wit, on the 26th day of August, 1915,

the Commissioners of the Land Office of the State of Oklahoma in session, had among others the following proceedings:

"Whereas we have had offers from reputable parties to place oil and gas bids on the following unsegregated school lands, I hereby recommend that the following described land be segregated for oil and gas purposes and that they be advertised for bids for leasing * * * the Northeast Quarter ($\frac{1}{4}$) of Section Thirty-three (33), Township One (1), South, Range Eight (8) West, Stephens County * * *. After discussion by the Board, it was thereupon moved by Mr. Lyon and seconded by Mr. Howard, that the above sections and quarter sections be declared valuable for mineral purposes and the same be segregated and withheld from sale."

And the same is entered of record in the office of the Board of Land Commissioners of the State. And, thereafter, after advertisement of said tract for leasing for oil and gas purposes, and after receipt of bids thereon an instrument "Exhibit F" hereto and identified hereinabove in paragraph 10 was executed.

Mr. Boys: We desire to object to the introduction of the order of segregation of paragraph Eleven (11) read by counsel, for the reason it's irrelevant, incompetent and immaterial and tending to judge character of land under *ex parte* proceedings, and without notice or hearing to the lessee, Price, defendant herein, or of such action tending to make the same binding upon him without notice or hearing. We would like to have the stenographer note for the further reason that it was without the power of the Commissioners of the Land Office to pass such a resolution.

Court: Overruled. Exceptions.

Mr. Blakeney: We now desire to offer paragraph Twelve (12) of the stipulation in evidence, which reads as follows:

That about the time of the institution of this action, a producing oil well was brought in on said Section Thirty-three (33) and rapid development of oil followed in the other three quarters of said section thirty-three, and oil was produced therefrom and that on this date, a number of producing oil wells are on said section.

We also offer in evidence paragraph Thirteen (13) of the stipulation, which reads as follows:

That since the institution of this action and under the

protection of the injunction herein issued, said Northeast Quarter (NE $\frac{1}{4}$) of said Section Thirty-three (33) aforesaid, a number of producing oil wells have been drilled by the plaintiff and plaintiff is continuing to make additional locations and drilling thereon and is taking the oil and gas from therein and thereunder over the objection and protest of defendant. That plaintiff, before suit and in petition, offered to pay to the defendant for any damage or loss that they might be entitled to under Section 7200 of Revised Laws of 1910, and Chapter ---- of the laws of 1917, but the defendants still refused to allow plaintiff to go said premises for the purposes aforesaid. After this action was instituted and the injunction obtained, and continuously to this date, plaintiff has produced and is producing and taking from said lands a large amount of barrels of oil per day under the rights claimed by virtue of the lease, "Exhibit F" (Record p. 57).

PLAINTIFFS' EVIDENCE.

RALPH TALLEY, being first duly called as a witness for the Plaintiff and after being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. Blakeney:

Q. Mr. Talley, state your name to the Court?

A. Ralph Talley.

Q. Where do you reside?

A. Duncan, Oklahoma.

Q. What is your business or occupation now?

A. Working for Magnolia Petroleum Company.

Q. Were you working for the Magnolia Petroleum Company at the time the plaintiff attempted to procure possession of the property in controversy in this case?

A. I was.

Q. You are acquainted with Mr. and Mrs. Price?

A. I am.

Q. Where did you first see them; where did you first meet them?

A. I guess here in town. You mean after this case started?

Q. You went out to their place to see about getting possession of this land?

A. Yes, sir.

Q. Did you attempt to obtain possession of this property

in order that the Magnolia Petroleum Company might drill and develop it?

A. I did.

Q. Did you, on or about the 25th day of May, 1920, have a talk with the defendant, Price, about procuring a location for Magnolia Petroleum Company, to commence drilling?

A. Yes, sir.

Q. Do you know the date of that conversation?

A. No, sir; I think early in May; I think 12th day of May.

Q. 1920?

A. 1920.

Q. Where did you see him at that time?

A. At his home.

Q. Mrs. Price there?

A. Yes, sir.

Q. I wish you would now state the conversation you had with them?

A. Sense of the conversation was I went out to make arrangements for a location on this tract of land and I went to see these parties to see what kind of agreement we could make to get it and Mr. Price told me that he would sell out to us all of his right for \$50,000.00, or we could give him one-half ($\frac{1}{2}$) of any royalty and that is the only agreement he would make with reference to us getting it.

Q. You stated about agreement about getting it; anything said there about any damages that would be done to his crops by reason of the drilling on there?

A. Yes, sir; we talked about that.

Q. What did you say with reference to that?

A. We talked over the damage that would accrue on account of the cotton crop coming in; damage to the surface of the land and we proposed to leave the damages to a board of arbitration.

Q. Why did you propose that; could you agree on it?

A. No, sir.

Q. The measure of damages you couldn't agree?

A. No, sir.

Q. Just what else was done or what else was said between you; did he state how much damage would be done to the land.

Mr. Boys: We object to that as to what he said.

Court: Let him answer over objections. Exceptions.

Q. Tell us the conversation between you if you can?

A. Well, that was about all of it; we talked quite a little time about it, but it was along the same line.

Q. On what line?

A. Trying to make arrangements to come in and make a location and operate on the lease.

Q. What, if anything, did he say why he hadn't bought the land, or why it hadn't been sold?

Mr. Boys: Object to that; irrelevant, incompetent and immaterial.

Court: Overruled. Defendant excepts.

A. I believe first he said because he had bought this land from a party named DeArmon, or had bought his preference right to the lease and he hadn't paid DeArmon the full amount he was to pay him and that DeArmon was gone some place when the appraisers first came around and that the title to the agricultural part at that time stood in DeArmon's name and they couldn't make arrangements for the land to be sold. I think he said they were around three different times to appraise the improvements on the land so it could be sold. I think the second time they couldn't arrive at an agreement as to the value of the improvements on the land.

Q. What, if anything, did he say about having any objections to the Magnolia?

A. I don't know that he said he had any objections.

Q. Did he say anything about that if you recall?

A. Along what line was that?

Q. I can't lead you. I just want you to tell all the conversation. I haven't talked to this witness, court please, and I just want to refresh his memory the best I could. Have you told all you can recall?

A. I believe I have at this time.

Q. Did you say, in that conversation, you would pay him for any damage he might sustain, for any damage he might sustain by us going on there?

A. Yes, sir; I proposed that to him. I proposed to pay him.

Q. I'll ask you if you went out there for that purpose?

A. I did.

Q. You stated he wanted \$50,000.00 or half of the royalty?

A. Only proposition he would make; that is as far as we could get with him.

Cross examination by Mr. Sharp:

Q. Say you are an employee of the Magnolia?

A. Yes, sir.

Q. How long have you been in their employ?

A. 15th of September, 1919.

Q. What department?

A. Lease and claim department.

Q. Claims that arose in this case came under your authority?

A. Yes, sir.

Q. Now, you say you had this conversation, you think, about the 12th of May?

A. About that date.

Q. Where was that conversation; Mr. Price's home?

A. Yes, sir.

Q. Who was present?

A. Mr. Price, Mr. Neal and I.

Q. Who is Mr. Neal?

A. An employee of the company.

Q. Where is Mr. Neal?

A. Here in the room.

Q. Court room?

A. Yes, sir.

Q. Anyone else present?

A. Probably some of Mr. Price's little girls heard the conversation, part of it anyway.

Q. You say Mr. Price wanted you to pay him \$50,000.00, or half of the royalty?

A. Yes, sir.

Q. In order to let you go in and commence drilling, or to make a location?

A. Yes, sir.

Q. That was for his rights in the land he contended for?

A. Yes, sir.

Q. Was it in that same conversation you say Mr. Price stated he hadn't settled with Mr. DeArmon?

A. Yes, sir.

Q. Are you sure of that, Mr. Talley?

A. Yes, sir.

Q. What did he say he hadn't settled?

A. It hadn't been settled when these appraisers came around the first time; in order to have the land sold he had to have the right to the improvement in order to have the land sold.

Q. You don't mean to say at the time of this conversation he hadn't settled with Mr. DeArmon?

A. No, sir.

Q. Do you know what time Mr. Price bought that land?

A. No, sir.

Q. Did he tell you?

A. I believe he did.

Q. Didn't he tell you he bought it October, 1908?

A. He might have, I don't know.

Q. Do you know when he moved on the land?

A. No, sir.

Q. Did he tell you?

A. No, sir.

Q. Had you known Mr. Price before this time?

A. Yes, sir.

Q. How long?

A. Possibly two or three years.

Q. You think you have told all the conversation you had there?

A. We had quite a conversation; I suppose we talked there about an hour.

Q. In other words he asserted his rights to that land and wanted you to pay him \$50,000.00 or give him half of the royalty?

A. Yes, sir; said we could pay him \$50,000.00, and he would give it up and leave, or could pay him one-half of the royalty and he would give it to us; that was his proposition.

Q. How much did you offer him there for his right?

A. I didn't make any offer any more than I offered to leave it, that is, the damages, to a board of arbitration.

Q. That is as near as you came and he refused to do that?

A. My proposition was for him to select a man and I select one and these two select the third and leave it to them as to the amount of damages.

Q. In that conversation when he said he wanted \$50,000.00, that was for a release of his preference rights?

A. Yes, sir; I suppose that is what he meant.

Q. That is what he said?

A. Don't know that he said that; he said if we would give him \$50,000.00, he would get out and let us have it.

Q. Has he been living there all the time you have known him?

A. Yes, sir.

Q. As a home?

A. Yes, sir.

Q. Still living there?

A. Yes, sir.

Q. You have detailed all the conversation that took place in respect to any settlement with Mr. Price, have you, for going on the land?

A. Mr. Price talked at length about his misfortune; he talked about not getting a satisfactory appraisement on the place; didn't satisfy him.

Q. Now, I mean your entire testimony on the stand; you have stated here on the stand all that transpired or took place in regards to settlement?

A. Yes, sir; as far as I remember at this time that is all.

Examination by Mr. Merritt:

Q. Mr. Talley, in that conversation relative to the appraisement, did he make any complaint because the State had endeavored to fix the appraisement with him?

A. He didn't think they had given him enough; didn't think they had appraised the improvements high enough.

Q. Did he state why he didn't think it was high enough?

A. I don't know.

Q. I will ask you if he didn't state to you that another man, or one of his neighbors, wanted to bid on it and he wanted the State to raise the appraisement to keep the other man from coming in and bidding on the property.

Mr. Sharp: We object to that; incompetent and not material.

Court: Overruled. Defendant excepts.

A. He said one time they were trying to get him to agree to the appraisement on the improvements. He said one of the neighbors was figuring on the land and he couldn't afford to pay as much as he could.

Q. That is why he wanted the appraisement made higher?

Mr. Sharp: Objected to for the reason it is immaterial.

Court: Overruled. Defendants excepts.

A. I suppose so from his conversation.

Mr. Sharp: We move the answer be stricken as a presumption of the witness.

Court: Let it be stricken.

That's all.

Re-cross examination by Mr. Sharp:

Q. What appraisalment was he talking of?

A. Appraisalment on the improvements on the land.

Q. For what year?

A. For the time it would be sold.

Q. Did he tell you how many appraisements had been made on the land by the School Land Board Commission, or its officers?

A. Yes, sir; he said they attempted to appraise it three times.

Q. Not complaining of all the appraisalment, was he?

A. First one, I think, he said was satisfactory, but the lease to the land was not in his name, it was still in DeArmon's name.

Q. The first one was satisfactory, but the second was not appraised sufficiently high?

A. I think that is right.

Q. And the third one; what did he say about that, do you remember?

A. Yes, sir; was that they hadn't given a satisfactory appraisalment on the improvements.

Re-direct examination by Mr. Blakeney:

Q. Did you have more than one conversation with him?

A. Later on, Mr. Campbell, Mr. Ambrister and Mr. Fairchild, and I,—

Q. Know what they went out there for?

A. Same purpose.

Q. Same purpose doesn't explain. What was it?

A. To make arrangements with him to operate on the lease.

Q. What arrangements did they go out to make?

A. Stake out a location.

Q. Mr. Ambrister is a lawyer?

A. Yes, sir.

Q. Did he go out to stake out a location?

A. He went out to see something about settlement for damages.

Q. That is what you went out there for, to settle for damages?

A. Yes, sir.

Q. Tell him you were out for that purpose?

A. Yes, sir.

Q. What did he say?

A. Told me about the same as first time.

Q. Did he say he would or would not settle for any damages caused by a location on the property?

A. Said he wouldn't settle.

Q. He said the Company could buy the entire right, and all the right he claimed by giving him \$50,000.00, or one-half of the royalty, or tear up the lease with the State and lease from him; did he say that?

A. Yes, sir.

Q. And wouldn't settle for damages to his crop or damage to the surface rights under the lease?

A. No, sir.

Re-cross examination by Mr. Sharp:

Q. You didn't make him any offer at that time?

A. No more than to leave it to arbitration.

That's all.

Witness excused.

CHAS. M. NEAL, being called as a witness for the plaintiff and after being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Blakeney:

Q. State your name to the court?

A. Chas. M. Neal.

Q. You are in the service of the Magnolia Petroleum Company?

A. I am.

Q. In what department?

A. In the land and lease department.

Q. Acquainted with Mr. Price?

A. Met him once.

Q. When was that?

A. That was on a trip I made to Mr. Price's home with Mr. Talley, middle of May, sometime.

Q. Did you have or hear a conversation between Mr. Talley and Mr. Price?

A. I did.

Q. Between Mr. Price and Mr. Talley?

A. Yes, sir, I did.

Q. Just state the conversation you heard there?

A. Mr. Talley called me and told me that he had a matter to take up with Mr. Price, relative to securing his permission to drill a well on that quarter section of land where Mr. Price lives—

Q. Just tell what conversation occurred out there?

A. We approached Mr. Price and Mr. Talley asked him his objections to the Magnolia drilling on this piece of land and he said his objections was that the State hadn't treated him right and so far as that was concerned he figured he was the party from whom the Magnolia Company should have leased from instead of the State; that was his objections, because the Magnolia was attempting to drill on the land under a lease from the State, instead of from him, and Mr. Talley and myself asked him some questions with reference to what damages he would claim for a location on the place and that was our business out there, and he said he would consider no such proposition, that the only proposition he would consider that we pay him \$50,000.00 for his interest in that quarter section or that he would accept one-half of the royalty derived from the property, or if the Magnolia Company would tear up the lease with the State and make a new one with him and that is the only three ways by which they could do business with him.

Q. What did he say with reference to how he would let the Magnolia Company come in and drill?

A. He said he would only accept only under those three propositions.

Q. Is that all the conversation that you can remember?

A. That is about all the conversation with reference to drilling on the place; he went into details why he didn't own the land.

Q. What did he say with reference to that?

A. He said the State had made several appraisements, don't know how many, on the place; that one of the appraisements he couldn't accept on account of the title not being in

him at that time, of another appraisement, or possibly two more was because he had a couple of neighbors to his north that could afford to pay more for this land than I can and I don't want it sold for that reason; the other reason is he didn't want it sold because he had bought the preference right at a bargain; of course, the State had offered him as much money as he had paid, but just because he had bought it at a bargain it was no reason why he should sell it at a bargain.

Cross examination by Mr. Sharp:

Q. This conversation was had by Mr. Talley, and you were there present?

A. Yes, sir.

Q. You were present together during the entire time?

A. Yes, sir.

Q. You know he told you during that conversation there had been several appraisements made?

A. Yes, sir; he did.

Q. Did he tell you he was satisfied with any of those appraisements?

A. I believe he said he was satisfied with one, but he couldn't accept it.

Q. That is while the lease was in DeArmon's name?

A. I believe it was.

Q. In other words, that is what you understood to be the first appraisement, while the title yet stood in DeArmon's name?

A. Yes, sir.

Q. Did he say anything at that time, that he, at the time of the appraisement, hadn't fully settled with Mr. DeArmon?

A. Yes, sir; he said he owed Mr. DeArmon something on this purchase and he said Mr. DeArmon was forced to leave the country on account of some trouble he had and he was unable to pay him. I don't know whether he meant he was unable financially, or whether he couldn't reach him.

Q. That appraisement was satisfactory, but the title was not in his name?

A. That is the way I understood it.

Q. The other appraisement, did he tell you when it was made?

A. He possibly did.

Q. Do you know when it was made?

A. No, sir.

Mr. Boys: I want at this time to object to any appraisal subsequent to the first appraisalment, for the reason, under the law, no appraisalment could be made, except for 1907-1908.

Court: Overruled. Exceptions.

Q. Was that the appraisalment that seemed to be satisfactory to him?

A. I don't know how many he said had been made since he owned the property; two or three, but none of them had been satisfactory.

Q. None of the appraisements made while he owned the lease were satisfactory?

A. While he had it in shape to accept the place.

Q. He said he didn't want the land sold?

A. He did.

Q. That was in 1920, you are talking about?

A. Yes, sir.

Q. About the middle of May?

A. Yes, sir; that is when I went there with Mr. Talley.

Q. And he wanted from you at that time \$50,000.00, or one-half of the royalty, or that the Magnolia could tear up the lease from the State and lease from him, those are the three propositions he made?

A. Yes, sir, certainly.

Q. Were there anything said there at that time about his preference right lease on that land?

A. No, only general supposition that he did.

Q. Said he was holding the place under a preference right?

A. Said he received another lease from the School Land Department for another period of years for agricultural purposes.

Q. And that he owned a preference right to buy when sold?

A. Nothing said about right to buy when sold; said he owned an agricultural lease that was about to expire.

Q. You are sure he used the word "Agricultural"?

A. I am not positive about the word, but I am sure it was not an oil and gas lease.

Q. When you had this conversation with Mr. Price, I understand you to say he said he didn't want this land to sell; was that under the first appraisalment or under the second appraisalment that was unsatisfactory?

A. He said he didn't want it to sell while he was not in a position to accept the appraisalment.

Q. That he had never wanted it to sell?

A. Yes, sir; for the reason he said there were some neighbors of his that were more able to buy than he.

Q. You are quite certain of that?

A. I am.

That's all.

Witness excused.

LOUIS CAMPBELL, being called as a witness for the plaintiff and after being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Blakeney:

Q. State your name?

A. Louis Campbell.

Q. You are in the service of the Magnolia?

A. Yes, sir.

Q. In what capacity?

A. Land and lease department.

Q. Are you acquainted with Mr. Price?

A. Yes, sir.

Q. Did you see Mr. Price in the month of May, 1920?

A. Yes, sir.

Q. Whereabouts?

A. At his place, his home.

Q. Just state what conversation, if any, you had with him about a settlement for damages?

A. Well, I went out to see Mr. Price about damages for drilling on there, on the land in controversy; that is after Mr. Talley and Mr. Neal had been out there, and I told him we would like to make arrangements to get in and we were willing to pay him whatever damages was proper, and he said he had talked to us before and was not willing for us to go in at all; that he didn't care to discuss damages, but if we wanted possession of the land that we could get it by buying him out, by paying him \$50,000.00, or could give him one-half of the royalty.

Q. Was that all the conversation you had with him about paying any damages?

A. Well, I told him we couldn't do that; that was entirely unreasonable and we offered then to arbitrate it and he wouldn't listen to that proposition.

Q. What, if anything, did he say about intending to fight the Magnolia?

A. Well, he said he wasn't going to let us in there; that he had no objections to the Magnolia as a Magnolia, but he thought he owned the land and that a number of lessees in the same position had agreed not to recognize any oil leases on the land where they were living.

Cross examination by Mr. Sharp.

No questions.

Witness excused.

Mr. Blakeney: We now offer in evidence and ask that the same be marked plaintiff's Exhibit "1," same being the original lease executed by the Commissioners of the Land Office of the State of Oklahoma, on the 2nd day of January, 1913, and as this is the original file we offer a photographic copy of the same and ask leave to substitute for the original and marked Exhibit "1."

Court: Let the original be introduced and withdrawn and the photographic copy substituted for plaintiff's Exhibit "1."

Exhibit "1" of plaintiff is received in evidence and by the Court Reporter marked plaintiff "Exhibit 1" and the same is in words and figures as follows, to wit:

Mr. Blakeney: All these papers attached together are certified copies of the proceedings before the Commissioners of the General Land Office, and I want to say that the relationship shows only by a comparison with all of them. I will offer them separately and ask that this be marked plaintiff's Exhibit "3" and offer it in evidence.

Mr. Sharp: We object to the introduction of Exhibit "3" for the reason it's incompetent, irrelevant and immaterial and does not purport to bear on the lease on the land to the Magnolia Petroleum Company, but to different parties, some time anterior to the making of the Magnolia lease, and for the further reason that the State was without authority to enact a law authorizing the Commissioners of the Land Office to segregate land of the character of this land for oil and gas purpose, where, on the advent of statehood and subsequent thereto, a preference right existed to purchase it and all of it, and for the further reason it does not appear from the certified copies that any authority to make this lease, or that any knowledge thereof was brought home to lessee, or that he

in any way ratified or consented to the same, and the state did not have the authority to enact any such legislation, or the Commissioners of the Land Office to execute any purported authority conferred under such act.

Court: Overruled. Defendants except.

Exhibit "C" is received in evidence and so marked by the Court reporter and is in words and figures, as follows, to wit:

Meeting of the Commissioners of the Land Office of the State of Oklahoma held in the Office of the Secretary at Oklahoma City, Oklahoma, Thursday, August 26th, 1915, at 10:30 A. M.

Present:

Hon. M. E. Trapp, Acting Governor and Acting Chairman.

Hon. E. B. Howard, State Auditor.

Hon. J. L. Lyon, Secretary of State.

Hon. F. M. Gault, President Board of Agriculture.

Absent:

Hon. R. H. Wilson, State Supt. Public Instructions.

The following proceedings, among others, were had:

In re Segregation of Lands for Oil and Gas Purposes: The Secretary presented the following recommendations to the Board:

"Whereas, we have had offers from reputable parties to place oil and gas bids on the following un-segregated School Lands, I hereby recommend that the following described lands be segregated for oil and gas purposes, and that they be advertised for bids for leasing.

Section 36, Twp. 1 South, Range 9 West, Stephens County.

The NE $\frac{1}{4}$ of Section 33, Twp. 1, Range 8 West, Stephens County.

Section 16, Twp. 9, Range 5 East, Pottawatomie County.

After discussion by the Board, it was thereupon moved by Mr. Lyon and seconded by Mr. Howard that the above Sections and Quarter Section be declared valuable for mineral purposes, and that the same be segregated and withheld from sale.

All vote aye. Motion prevailed.

Re Advertising State Lands for Oil and Gas Bids:

On motion of Mr. Lyon and seconded by Mr. Howard, the Secretary was instructed to cause to be advertised, under the law, the following described lands:

Section 36, Twp. 1 South, Range 9 West, Stephens County.
The NE $\frac{1}{4}$ of Section 33, Twp. 1, Range 8 West, Stephens County.

Section 16, Twp. 9, Range 5 East, Pottawatomie County.

Section 16, Twp. 10, Range 5 East, Pottawatomie County.

Section 16, Twp. 27 North, Range 1 East, Kay County.

Section 36, Twp. 29 North, Range 2 West, Kay County.

All vote aye. Motion prevailed.

Witness my hand and official signature, at Oklahoma City,
Oklahoma, on this the 26th day of August, 1915.

(Signed)

M. E. TRAPP,

*Acting Governor and Acting Chairman of
the Commissioners of the Land Office of
the State of Oklahoma.*

Attest:

A. M. McKINNEY,
Secretary.

STATE OF OKLAHOMA,
Oklahoma County, ss.:

I, A. S. J. Shaw, the duly appointed, qualified and acting
Secretary to the Commissioners of the Land Office of the
State of Oklahoma, do hereby certify that the above and fore-
going is a true and correct copy of this part of the meeting
of the Commissioners of the Land Office at their meeting on
the 26th day of August, 1915.

In Witness Whereof, I have hereunto set my hand and
official seal, on this the 1st day of June, 1920.

[SEAL]

A. S. J. SHAW,

*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

Mr. Blakeney: We now offer in evidence Exhibit "4",
which reads as follows:

EXHIBIT "4"

*Meeting of the Commissioners of the Land Office of the State
of Oklahoma, held in the Office of the Secretary at Okla-
homa City, Oklahoma, Wednesday, October 6, 1915, at 3
P. M.*

Present:

Hon. R. L. Williams, Governor and Chairman.

Hon. J. L. Lyon, Secretary of State.

Hon. E. B. Howard, State Auditor.

Hon. R. H. Wilson, State Supt. Public Instructions.

Absent:

Hon. F. M. Gault, President Board of Agriculture.

The following proceedings, among others, were had:

Re Opening of Oil and Gas Bids. In the matter of the opening of oil and gas bids before the oil and gas committee of the Commissioners of the Land Office, which were opened at 4:00 o'clock P. M., October 4, 1915, pursuant to advertisement, the following bids were received and opened by said committee, and the Oil and Gas Committee recommended that said bids be approved and accepted, same being as follows: Bid of Amanda K. Dumenil and associates, Oklahoma City, Oklahoma, Tract No. 14, Section 36, 1 S, 9 W. Stephens County, 12½% royalty, \$161.25 bonus, and agreement to begin drilling within 180 days. On tract No. 15, NE¼ 33, 1 S, 8 W, Stephens County, 12½% royalty, \$165.25 bonus, and agreement to begin drilling within 180 days. Bid accompanied by certified check of \$1,000.00.

Bid of R. L. Irion of Cleveland, Oklahoma, tract No. 20, Section 36, Township 2, 1 N, 8 E., Pawnee County, 12½% royalty, no bonus, and agreement to begin drilling within 90 days. Bid accompanied by certified check of \$1,000.00.

The above bids were the only bids received.

It was thereupon moved by Mr. Lyon and seconded by Mr. Wilson that the recommendation of the oil and gas committee be and the same is hereby approved and accepted, and the chairman and secretary are hereby authorized to enter into oil and gas leases with said successful bidders as above set out.

All vote aye. Motion prevailed.

All lands in this sale are entered as segregated.

Witness my hand and official signature, at Oklahoma City, Oklahoma, on this the 2nd day of June, 1920.

R. L. WILLIAMS,

*Governor, and Chairman of the Commissioners
of the Land Office of the State of Oklahoma.*

Attest:

(Signed) A. McKINNEY,
Secretary.

STATE OF OKLAHOMA,
Oklahoma County, ss.:

I, A. S. J. Shaw, the duly appointed, qualified and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of this part of the meeting of the Commissioners of the Land Office at their meeting on the 6th day of October, 1915.

In Witness Whereof, I have hereunto set my hand and official seal on this the 2nd day of June, 1920.

A. S. J. SHAW,
*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

Mr. Blakeney: We offer in evidence Plaintiff's Exhibit Four (4).

Mr. Sharp: We object to the introduction of Exhibit "4" in evidence for the reason it is incompetent, irrelevant and immaterial and for the further reason that it does not purport to bear on the lease on the land to the Magnolia Petroleum Company, but to different parties, some time anterior to the making of the Magnolia lease, for the further reason that the State was without authority to enact a law authorizing the Commissioners of the Land Office to segregate lands, of the character of this land, for oil and gas purposes, where, on the advent of statehood a preference right existed to purchase it and all of it, and for the further reason that it does not appear from the certified copy that any authority to make lease, or that any knowledge thereof was brought home to the lessee, or that he in any way ratified or consented to the same, and the State did not have the authority or power to enact any such legislation, or the Commissioners of the Land Office, to execute any such purported lease under any authority conferred by or under such act.

Court: Overruled. Defendants except.

PLAINTIFF'S EXHIBIT "5."

Meeting of the Commissioners of the Land Office of the State of Oklahoma, held in the Office of the Secretary, at Oklahoma City, Oklahoma, Wednesday, January 26th, 1916, at 2:30 P. M.

Present:

Hon. R. L. Williams, Governor of Oklahoma

Hon. J. L. Lyon, Secretary of State.

Hon. E. B. Howard, State Auditor.

Hon. F. M. Gault, President Board of Agriculture.

Absent:

Hon. R. H. Wilson, State Supt. Public Instructions.

The following proceedings, among others, were had:

Re Oil and Gas Lease: In the matter of the application of Amanda K. Dumenil to have the oil and gas lease awarded under his bid on Section 36, 1 S., R. 9, W., Stephens County and NE 33 1 S., 8 W., Stephens County, October 4, 1915, made direct to the Bear Creek Petroleum Company, said application stating that the Bear Creek Petroleum Company is not affiliated with any pipe line company or corporation that is not eligible to bid on State lands; it was thereupon moved by Mr. Lyon and seconded by Mr. Howard that said application be granted and the oil and gas lease awarded under said bid ordered made to the Bear Creek Petroleum Company as requested.

All vote aye. Motion prevailed.

Witness my hand and official signature, at Oklahoma, Oklahoma, on this the 2nd day of June, 1920.

R. L. WILLIAMS,

*Governor, and Chairman of the Commissioners
of the Land Office of the State of Oklahoma.*

Attest:

(Signed) A. M. McKINNEY,
Secretary.

STATE OF OKLAHOMA,

Oklahoma County, ss.:

I, A. S. J. Shaw, the duly appointed, qualified and acting Secretary of the Commissioners of the Land Office of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of this part of the meeting of the Commissioners of the Land Office at their meeting on the 26th day of January, 1916.

In Witness Whereof, I have hereunto set my hand and official seal on this the 2nd day of June, 1920.

A. S. J. SHAW.

*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

Mr. Blakeney: We now offer in evidence plaintiff's Exhibit Six (6).

Mr. Sharp: We object to the introduction of Exhibit "6" in evidence for the reason that it is incompetent, irrelevant and immaterial and for the further reason that it does not bear on the lease on the land to the Magnolia Petroleum Company, but to different parties, some time anterior to the making of the Magnolia lease and for the further reason that the State was without authority to enact a law authorizing the Commissioners of the Land Office to segregate lands, of the character of this land, for oil and gas purposes, where, on the advent of statehood a preference right existed to purchase it and all of it, and for the further reason that it does not appear from the certified copy that any authority to make lease, or that any knowledge thereof was brought home to the lessee, or that he in any way consented or ratified the same, and the State did not have the power or authority to enact any such legislation, or the Commissioners to execute any such purported lease, under the authority conferred upon them by or under such law.

Court: Overruled. Defendants except.

Meeting of the Commissioners of the Land Office of the State of Oklahoma, held in the Office of the Secretary, at Oklahoma City, Oklahoma, Thursday, January 3, 1918.

Present:

Hon. R. L. Williams, Governor of Oklahoma.

Hon. F. M. Gault, President State Board of Agriculture.

Hon. R. H. Wilson, Supt. of Public Instructions.

Absent:

Hon. J. L. Lyon, Secretary of State.

Hon. E. B. Howard, State Auditor.

The following proceedings, among others, were had:

Re Oil and Gas: T. J. Ellis, Jr., Special Agent Oil & Gas Division, presents release of oil and gas lease of the Bear Creek Petroleum Company, covering the NE $\frac{1}{4}$, Sec. 33, Twp. 1 S., Range 8 W., Stephens County, Oklahoma, and recommends the acceptance of same. Said release is dated December 11th, 1917, executed by the Bear Creek Petroleum Company, by Thos. E. Toney, President, attest, Theodore Stockdell, Secy, and acknowledged before Tina B. West, N. P., Okla. County, on same date; the date of the lease affecting

being Dec. 29, 1915. It was moved by Mr. Gault and seconded by Mr. Wilson that said release of oil and gas lease aforesaid be and the same is hereby accepted in accordance with the recommendation of the Special Agent, and ordered filed with the Oil and Gas Division.

All vote aye. Motion prepailed.

Witness my hand and official signature, at Oklahoma City, on this the 3rd day of January, 1918.

(Signed)

R. L. WILLIAMS,
*Governor, and Chairman of the Commissioners
of the Land Office of the State of Oklahoma.*

Attest:

(Signed) A. M. McKINNEY,
Secretary

STATE OF OKLAHOMA,

Oklahoma County, ss.:

I, A. S. J. Shaw, the duly appointed, qualified and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of this part of the meeting of the Commissioners of the Land Office at their meeting on the 3rd day of January, 1918.

In Witness Whereof, I have hereunto set my hand and official seal, this the 1st day of June, 1920.

A. S. J. SHAW,
*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

[SEAL]

Mr. Blakeney: Plaintiff now offers Exhibit "7" in evidence.

Mr. Sharp: We object to the introduction of Exhibit "7" for the reason it is irrelevant, incompetent and immaterial and for the further reason that it purports to be an order made by the Commissioners of the Land Office, authorizing one T. J. Ellis, Jr., to advertise certain lands in Cotton county, such as in his opinion should be advertised for oil and gas purposes, same constituting within itself unauthorized delegation of power on behalf of the Board, for the further reason that any statute made or enacted, authorizing the Board to segregate oil and gas land, unsold public lands of the State,

was in violation of the constitutional rights of the defendants, holding preference right leases, such as defendant, Price, here, and for the further reason that any authority exercised by the Commissioners of the Land Office, under such statute, would be without force and without other lawful authority.

Court: Overruled. Defendants excepts.

EXHIBIT "7."

Meeting of the Commission of the Land Office of the State of Oklahoma, Held in the Office of the Secretary at Oklahoma City, Oklahoma, Tuesday, March 12, 1918, at 2 P. M.

Present:

Hon. E. B. Howard, State Auditor, and Acting Chairman.

Hon. R. H. Wilson, State Sup't. of Public Instruction.

Hon. F. M. Gault, President State Board of Agriculture.

Hon. J. L. Lyon, Secretary of State.

Absent:

Hon. R. L. Williams, Governor and Chairman.

The following proceedings among others were had.

Re Oil & Gas. In the matter of advertising certain lands in Stephens and Cotton Counties for lease for oil and gas purposes, after discussion by the Board it was moved by Mr. Gault, and seconded by Mr. Wilson, that T. J. Ellis, Jr., Special Oil Agent Oil and Gas Division, be and he is hereby authorized and directed to advertise all such lands in said Stephens and Cotton Counties for lease for oil and gas purposes, which, in his opinion, should be advertised at this time.

All vote aye. Motion prevailed.

Re Oil & Gas: In the matter of advertising further lands for lease for oil and gas purposes, after discussion by the Board, it was moved by Mr. Wilson and seconded by Mr. Gault, that T. J. Ellis, Jr., Special Agent Oil & Gas Division, be and he is hereby directed to prepare and submit at the next meeting of the Board a list of all lands which, in his opinion, should be advertised for lease for oil and gas purposes, for the consideration of the Board.

All vote aye. Motion prevailed.

Witness my hand and official signature, at Oklahoma City, Oklahoma, on this the 12th day of March, 1918.

(Signed) E. B. HOWARD,

Attest: *State Auditor and Acting Chairman.*

(Signed) A. M. McKINNEY, *Secretary.*

STATE OF OKLAHOMA,
Oklahoma County, ss.:

I, A. S. J. Shaw, the duly appointed, qualified and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of this part of the meeting of the Commissioners of the Land Office at their meeting on the 12th day of March, 1918.

In witness whereof, I have hereunto set my hand and official seal, on this the 1st day of June, 1920.

A. S. J. SHAW,
*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

[SEAL]

Mr. Blakeney: Plaintiff now offers in evidence Exhibit "8."

Mr. Sharp: We object to the introduction of Exhibit "8" for the reason that it is irrelevant, incompetent and immaterial; because it was made in pursuance to a statute of the State which is violative of the constitutional rights of the defendants, W. T. Price and his wife, and that any rights exercised by the Commissioners of the Land Office, pursuant to said statute, is without force and not binding upon the defendants in this case.

Court: Objections overruled. Defendants except.

PLAINTIFF'S EXHIBIT "8."

Meeting of the Commissioners of the Land Office of the State of Oklahoma, held in the Office of the Secretary at Oklahoma City, Oklahoma, Wednesday, November 20, 1918, 2:00 P. M.

Present:

Hon. R. L. Williams, Governor of Oklahoma, and Chairman.

Hon. R. H. Wilson, State Sup't. of Public Instruction.

Hon. J. L. Lyon, Secretary of State.

Absent:

Hon. F. M. Gault, President State Board of Agriculture.

Hon. E. B. Howard, State Auditor.

The following among other proceedings were had:

The Commissioners of the Land Office of the State of Oklahoma will receive sealed bids for the leasing of the herein-after described tracts of the public state school lands of the State of Oklahoma for oil and gas purposes. All leases will be made upon sealed bids, to be opened at the office of the Secretary to the Commissioners of the Land Office at the hour of 2 o'clock P. M. on the 31st day of December, 1918, and said leases will be sold and such sales made in accordance with the terms and conditions as hereinafter set out.

The number and description of the tract, among others to be leased by the Commissioners of the Land Office, is as follows, to wit:

Trace No. 162, NE $\frac{1}{4}$ of Sec. 33 Twp. 1S, and Rge. 8 W., Stephens County, Oklahoma.

Witness my hand and official signature, at Oklahoma City, Oklahoma, on this 20th day of November, 1918.

(Signed) R. L. WILLIAMS,
Governor, and Chairman of the Commissioners of the Land Office.

Attest:

(Signed) A. M. McKINNEY, *Secretary.*

STATE OF OKLAHOMA,
Oklahoma County, ss.:

I, A. S. J. Shaw, the duly appointed, qualified and acting Secretary of the Commissioners of the Land Office of the State of Oklahoma, do hereby certify that the above is a true and correct copy of this part of the meeting of the Commissioners of the Land Office at their meeting on the 20th day of November, 1918.

In witness whereof, I have hereunto set my hand and official seal on this 1st day of June, 1920.

A. S. J. SHAW,
Secretary to the Commissioners of the Land Office of the State of Oklahoma.

[SEAL]

Mr. Blakeney: We ask that this paper be marked Plaintiff's Exhibit "9" and we offer this in evidence.

Mr. Sharp: This Exhibit "9" is objected to for the reason it is incompetent, irrelevant and immaterial and for the further reason that same purports to be the action of the Board in deferring the awarding of leases on certain lands advertised as tract No. 162, being the Price land; that such proceedings were had in pursuance of an invalid and unconstitutional statute, and is a denial of the defendant, Price's, rights, both under the enabling act and under both State and Federal Constitution, referring to process and etc.

Court: Overruled. Defendants except.

PLAINTIFF'S EXHIBIT "9."

Meeting of the Commissioners of the Land Office of the State of Oklahoma, held in the Office of the Secretary, at Oklahoma City, Oklahoma, Tuesday, December 31, 1918, at 2:00 P. M.

Present:

Hon. R. L. Williams, Governor of Oklahoma.

Hon. J. L. Lyon, Secretary of State.

Hon. R. H. Wilson, State Supt. of Public Instruction.

Hon. F. M. Gault, President State Board of Agriculture.

Absent:

None.

The following proceedings, among others, was had:

Bid of the Magnolia Petroleum Company, accompanied by certified check in the sum of \$1,000.00. Tract No. 162, \$8,000.

All of said oil and gas bids having been opened and read, it was moved by Mr. Wilson that the awarding of leases under said bids be deferred until 10:00 o'clock A. M., Saturday, January 4th, 1919.

There being no other business at this time, the Board adjourned until 10:00 A. M., Saturday, January 4th, 1919.

(Signed) R. L. WILLIAMS,

*Governor, and Chairman of the Commissioners
of the Land Office of the State of Oklahoma.*

Attest:

(Signed) A. M. McKINNEY,
Secretary.

STATE OF OKLAHOMA,

Oklahoma County, ss.:

I, A. S. J. Shaw, the duly appointed, qualified, and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of this part of the meeting of the Commissioners of the Land Office at their meeting on the 31st day of December, 1918.

In Witness Whereof, I have hereunto set my hand and official seal, on this the 1st day of June, 1920.

A. S. J. SHAW,

*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

[SEAL]

Mr. Blakeney: We asked that this paper marked Plaintiff's Exhibit "10" and the same is offered in evidence.

Mr. Sharp: The same objections will be urged to No. 10 as to No. 9 and the further objection that the instrument shows on its face not to be complete within itself, but refers to other pages, to wit: 406-409 of some other record, which are not made a part of the exhibit.

Court: Overruled. Defendants except.

PLAINTIFF'S EXHIBIT "10."

Meeting of the Commissioners of the Land Office of the State of Oklahoma, held in the Office of the Secretary, at Oklahoma City, Oklahoma, Saturday, January 4, 1919, at 10:00 A. M.

Present:

Hon. R. L. Williams, Governor of Oklahoma.

Hon. J. L. Lyon, Secretary of State.

Hon. F. M. Gault, President State Board of Agriculture.

Hon. R. H. Wilson (present during latter part of meeting),
State Supt. of Public Instruction.

Absent:

Hon. E. B. Howard, State Auditor.

The following proceedings, among others, were had:

In the matter of the consideration of the oil and gas bids which were opened pursuant to advertisement December 31st,

1918, a tabulation of said bids by the Oil & Gas Division was presented to the Board, together with the report of the Special Agent, W. A. Durant, regarding adjacent development for oil and gas purposes and the general values prevailing in the neighborhood of the respective tracts, which said report was read to the Board by Mr. Durant, in the case of each tract considered; the detailed bids, together with the tract numbers and descriptions having been received and opened (page 406-409) and said bids now coming on for consideration by the Board pursuant to adjournment the following proceedings were had, to wit:

Re Tract No. 162: It was moved by Mr. Wilson and seconded by Mr. Gault that the Magnolia Petroleum Company be awarded oil and gas lease under its oil and gas bid upon Tract No. 162.

Mr. Gault, "Aye"; Mr. Lyon, "Aye"; Mr. Wilson, "Aye"; Governor Williams, "No." Motion prevailed.

Witness my hand and official signature, at Oklahoma City, Oklahoma, on this the 4th day of January, 1919.

(Signed) R. L. WILLIAMS,
*Governor, and Chairman of the Commissioners
of the Land Office of the State of Oklahoma.*

Attest:

A. M. McKINNEY,
Secretary.

STATE OF OKLAHOMA,
Oklahoma County, ss.:

I, A. S. J. Shaw, the duly appointed, qualified and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, do hereby certify that the above and foregoing is a true and correct copy of this part of the meeting of the Commissioners of the Land Office at their meeting on the 4th day of January, 1919.

In Witness Whereof, I have hereunto set my hand and official seal, on this the 1st day of June, 1920.

A. S. J. SHAW,
*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

[SEAL]

Mr. Blakeney: We ask to have this instrument marked Plaintiff's Exhibit "11" and as it is the original file of the School Land Department, we ask we be permitted to withdraw the original and introduce a substitute copy, and we offer the Exhibit "11" in evidence.

Mr. Sharp: No objections.

PLAINTIFF'S EXHIBIT "11."

(Same as "Exhibit E" to Defendant's Answer to Amended Petition [Record p. 56].)

PLAINTIFF'S EXHIBIT "12."

Mr. Blakeney: We ask to have this instrument marked Plaintiff's Exhibit "12," and offer it in evidence.

Mr. Sharp: No objections.

(Same as "Exhibit C" to Plaintiff's Amended Petition [Record p. 54].)

Mr. Blakeney: Plaintiff rests at this time.

O. B. SURBER, being called as a witness for the defendants, and after being first duly sworn, to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Boys:

Q. Your name is O. B. Surber?

A. Yes, sir.

Q. You live in Chickasha, Oklahoma?

A. Yes, sir.

Q. You formerly lived in this county?

A. Yes, sir; used to live here.

Q. Did you own a school lease in Section Thirty-three (33)?

A. Yes, sir.

Q. This county?

A. Yes, sir.

Q. Did you have a preference right in that section or buy from another party?

A. Bought from another party.

Mr. Blakeney: We object to that unless it relates to this lease in Section Thirty-three (33).

Court: Overruled. Plaintiff excepts.

Q. What quarter section, in Section Thirty-three (33), Township One (1) South, Range Eight (8) West, did you have a lease on?

Mr. Blakeney: Object to that, not being the tract in controversy and being no way related to this lease.

Court: Overruled. Plaintiff excepts.

A. Southwest quarter.

Q. Was that put up at any time and sold in this county, in 1911?

Mr. Blakeney: Objected to irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. Did you attend that sale, personally?

Mr. Blakeney: We object to that; irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. Did you purchase your land at that land sale?

Mr. Blakeney: We object to that; irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. I'll ask you to state, Mr. Surber, whether or not all the land that was advertised and sold was bought by lessees?

Mr. Blakeney: We object to that; irrelevant and immaterial and not the best evidence.

Court: Overruled. Plaintiff excepts.

Q. I refer, of course, to the land in this county?

A. Yes, sir; so far as I know, the lessees bought it.

Mr. Blakeney: We move to strike the answer; the witness shows he is incompetent to answer.

Court: Overruled. Plaintiff excepts.

Q. Did they purchase it at par value?

Mr. Blakeney: Objected to; witness shows he is not a competent witness to answer that.

Court: Overruled. Plaintiff excepts.

A. They did, except one farm.

Mr. Blakeney: We move to strike out the answer of the witness for the reason it is irrelevant and immaterial and witness not qualified to answer.

Court: Overruled. Plaintiff excepts.

Q. At the time of that sale, Mr. Surber, was any of that land in Section Thirty-three (33) or in that vicinity, known in that community, known to you people as being valuable for oil and gas purposes?

Mr. Blakeney: We object to that; witness is incompetent to answer.

Court: Overruled. Plaintiff excepts.

A. No, sir; not that I know of.

Mr. Blakeney: We move to strike the answer from the record; the witness shows to be incompetent.

Court: Overruled. Plaintiff excepts.

Q. Was there any land in that vicinity known to you people as being valuable for oil and gas, up to the year of 1915?

Mr. Blakeney: We object to that question for the reason it is irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. I don't think that was known.

Mr. Blakeney: We object to that as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

Q. You had no knowledge of it yourself?

A. No, sir.

Q. Have you, since you purchased the land, executed an oil and gas lease on your land?

Mr. Blakeney: We object to that as immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. They are now producing oil and gas from your land?

Mr. Blakeney: We object for the reason it is not material.

Court: Overruled. Plaintiff excepts.

That's all.

Mr. Blakeney: No questions.

Witness excused.

W. T. PRICE, being called as a witness for the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Boys:

Q. You may state your name?

A. Price, W. T.

Q. Where do you live?

A. Stephens County, Oklahoma.

Q. What tract of land in Stephens County, Oklahoma, do you live on?

A. Section Thirty-three (33).

Q. Township One (1) South, Range Eight (8) West, the land in controversy?

A. Yes, sir.

Q. Of whom did you purchase that lease?

A. L. B. DeArman.

Q. When; what date did you purchase it, approximate?

A. Fall of 1908; I don't know exactly what date it was.

Q. At that time what did you pay him for it; what was your trade, or purchase?

A. \$2,050.00.

Q. Were there any deferred payment on that?

A. Yes, sir.

Q. How much?

A. \$500.00.

Q. When was that to be paid?

A. Next October 1st; October 1st, 1909.

Q. Did you pay that note at that time?

A. Yes, sir.

Q. Did he execute to you a relinquishment at that time?

A. Yes, sir.

Q. About when did he execute that relinquishment, with reference to the time you paid your note?

A. Must have been something like a couple of weeks. I know when I went to the bank; my note was at the bank and I wanted to pay it off and I asked for my note to Mr. DeArman; I was doing business at the First National Bank and Mr. Prentice in the bank said that Mr. DeArman had it with him and I left it with him to pay it.

Q. Did you secure a relinquishment later?

A. Yes, sir; in a week or two weeks it finally come when we found Mr. DeArman; he was in Texas; nobody knew where he was.

Q. What did you do with the relinquishment?

A. I sent it to Guthrie.

Q. To the Commissioners of the Land Office?

A. Yes, sir.

Q. Did you hear any more from that relinquishment?

A. At that time the land was appraised the year before. The appraisement wasn't satisfactory on our improvements.

Q. Did you hear any more about the relinquishment at that time?

A. No, sir; not a thing.

Q. Now, when you went on the land was the land appraised in 1909?

A. Yes, sir.

Q. Were you home when the appraisers were there?

A. No, sir.

Q. Remember where you were?

A. Yes, sir.

Q. Where?

A. Comanche.

Q. Your family was there?

A. Yes, sir; part of them; most of them what wasn't off at school.

Mr. Boys: The defendants now offer in evidence a certified copy of the Relinquishment from DeArman to W. T. Price, marked by the stenographer, Exhibit "A," same as "Exhibit F" attached to Defendant's Answer to Amended Petition (Record p. 57):

Mr. Blakeney: Objected to as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

Exhibit "A" is received in evidence and marked same by the Court Reporter.

Q. Do you have a copy of the appraisement made on those lands for the year 1909?

A. No, sir.

Q. What part of the year was that made, if you remember?

A. 1909.

Q. What part?

A. Early in the spring, along about the first of the year; I don't remember the exact date it was.

Mr. Boys: We now offer in evidence a certified copy of the appraisement as same appears on file in the office of the Commissioners of the Land Office, made upon the land in controversy, January 12th, 1909, and asks that the same be marked Defendant's Exhibit "B" by the stenographer.

Mr. Blakeney: To which we object as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

DEFENDANTS' EXHIBIT "B."

Defendants' Exhibit "B" is received in evidence and the same is in words and figures as follows, to wit:

Appraisal of School Lands.

NE Qr. of Sec. 33, Tp. 1 S., of R. 8 W., Stephens County (160 acres).

R. T. Price, Lessee; William T. Click, P. O. Comanche.

1. Topography, slightly rolling. Soil medium to good—sandy loam; good cotton land.

2. Acres prairie 90; bottom (----1st----2nd) slope East Upland, 160 Overflow-----Kind of prairie pasture—sage grass.

3. Acres timber 70 Bottom-----Upland-----kind of timber pasture Sage.

4. Kind and quality of timber. Post Oak P. B. Jack.

5. How much former timber land now under cultivation? 70 acres.

6. How much stony land? None. How much of it is good pasture?-----

7. Kind and quality of stone?-----

8. Have stone quarries, sand or cement beds been opened? No.

9. Any gypsum, cement, salt, mineral gas or oil? No.

10. Is land adjacent to minera., gas or oil production? No.

11. Additional acres advisable to cultivate? No.

12. Is tillable land in patches? No. How many?-----

13. Springs, water, streams, etc. East dry creek.

14. Distance from market $8\frac{1}{2}$ miles to Comanche; kind of roads? Fair.

15. Any timber land advisable to clear? No.

16. Any acreage tracts?----- Any public parks?----- Any burial places?-----

17. Any public roads or highways through land? No. Make design on plat.

18. Any railroads through land? No.

19. Give mileage, width of right of way, and make design on plat-----

20. How much land suitable for townsite purposes? None.
 21. How much land already used for townsite purposes? None.
 22. Will this land bring more for townsite purposes than for agricultural purpose?-----
 23. Is lessee bona fide resident of the State? Yes. Does he reside on land? Yes.
 24. How many children of lawful age has lessee? None.
 25. Does lessee own land in excess of one quarter section? No.
 26. Does lessee hold more than one quarter section? No.
 27. How much does lessee pay for lease? Do not know.
 28. Name of tenant?-----
 29. How much per acre does tenant pay lessee?-----\$-----
 30. Is neighborhood well settled? Yes.
 31. What class of people? A. American.
 32. How far from school house? 1½ miles.
 33. How is land cared for? Very well.
 Actual cash value of land, \$3,000.00.

Improvements.

Value

- Any improvement other than fencing and tillage? Yes.
 How long have improvements been made? 2 to 6 years.
 House (give size, how built and when finished) 16x32 box E. 22-24, built 1904, \$500.00. Smoke house 10x12, \$30.00. Poultry house, 8x10, \$15.00.
 Barn or stable (give size, how built) Barn 14x26 box, \$100.00. Crib and shed 16x30, \$100.00. Hay shed 10x18, \$40.00.
 Wells (give depth and description). One, drilled, 50 feet, \$25.00.
 Cisterns (give depth and description). None.
 Fences (give amount and kind). 640 rods of 3-wire, \$100.00.
 Fruit trees (give number, kind and age). 600 apple, 4 years old, \$300.00. 88 peach, 4 years, \$44.00. 60 grapes, \$44.00.
 Ornamental trees (give number, kind and age). None.
 Acres under cultivation, 90.
 Give how long broken, 2 to 6 years.
 Windmills. One, \$50.00. Tanks, none. Cellars, 8x10. reservoirs, none, \$50.00, \$15.00.
 Stone or cement sidewalk-----

Other improvements (give in detail). Tenant house, 14x28, box shed 10x28, \$200.00; barn 14x16 box, \$30.00; 30 rods of 26-in. hog wire \$6.00; one well dug 10 ft, \$10.00; cellar 8x10, \$10.00.

Total cash value of improvements, \$1,290.00.

Total cash value of land and improvements, \$4,290.00.

Amount of corn, cotton and other products raised during 1907? Do not know.

Amount of corn, cotton and other products raised during year 1908? Do not know.

Remarks. There is three acres of alfalfa in N. E. corner.

Notified lessee of appraised value of improvements-----
190__.

We hereby certify on honor and under our official oaths, that we have personally inspected the foregoing tract of land and improvements thereon, and that the above and foregoing statement and appraisalment is true, fair, correct and just according to our best judgment and belief.

Dated Jan. 12th, 1909.

J. L. FOSTER,

J. M. LOVELL,

J. A. BYERLY,

Appraisers.

I, E. P. Bryan, duly elected, qualified and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, and custodian of the records of said Commissioners, hereby certify that the attached copy of appraisalment is a true and correct copy of the appraisalment covering the NE 33, 1S, 8W, now on file in the office of said Commissioners.

Witness my hand and official signature at Oklahoma City, Oklahoma, on this the 27th day of November, 1920.

E. B. BRYAN,

*Asst. Secretary to the Commissioners of the
Land Office of the State of Oklahoma.*

[SEAL]

Mr. Boys: Defendants now offer in evidence certified copy of the minutes of the Commissioners of the Land Office under date of March 25, 1909, and ask that the same be marked defendants' Exhibit "C."

Mr. Blakeney: Plaintiff object as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff except.

Defendants' Exhibit "C" is received in evidence and is in words and figures as follows, to wit:

From the Minutes of the Meeting of the Commissioners of the Land Office of the State of Oklahoma, Held March 25th, 1909, at 2:00 P. M.

In the matter of the appraisement of school lands as provided by Art. 2, Chapter 49, of the Laws of 1907-08, commonly known as House Bill 414, the Sub-Committee of the Commissioners at a regular meeting to confer with the Secretary in examining into the work, beg leave to report as follows:

"That in connection with the Secretary, we have made a general examination of the appraisement above referred to and we recommend that all of the appraisements be approved excepting the report on the SW $\frac{1}{4}$ and SE $\frac{1}{4}$ of Sec. 33, Twp. 28 N., R. 20 W., and that the report on these two quarters be rejected and the Secretary ordered to re-appraise the same."

It was moved by Mr. Cameron and seconded by Mr. Cross that the report of the Committee and the recommendations of the Secretary be adopted and that the said appraisement with the exception of the two above described tracts of land, be declared the official appraisement.

Those voting "Aye"—Haskell, Cross and Cameron.

Those voting "No"—None.

Motion prevailed.

I, A. S. J. Shaw, the duly qualified and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true, and correct copy of that part of the minutes of the meeting of the Commissioners of the Land Office, held March 25th, 1909.

A. S. J. SHAW,

Secretary to the Commissioners of the Land Office.

[SEAL]

Q. Now, did you at any time perfect an appeal from the appraisement that was made in 1909?

Mr. Blakeney: Objected to as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. No, sir.

Q. Did you ever perfect an appeal from that appraisal to the District Court of Stephens County?

A. No, sir.

Q. You have not appealed and you have no appeal pending at this time from these appraisements that affected this land?

Mr. Blakeney: We object; irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. No, sir; none whatever.

Q. Now, Mr. Price, you are still living on that farm?

A. Yes, sir; staying out there.

Q. You and your family?

A. Yes, sir.

Q. Of what does your family consist?

Mr. Blakeney: Objected to as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. I have three children at home.

Q. You have resided on that land since you went on it in 1908, and are still residing there, and have claimed that as your home and are still claiming it as your home at this time?

Mr. Blakeney: Objected to as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. What did you purchase from Mr. DeArman at the time you purchased the property out there?

Mr. Blakeney: We insist that is not the best evidence; the written assignment shows what he purchased.

Q. Was your first contract of purchase with Mr. DeArman, in writing?

A. Yes, sir.

Q. The first deal; when you first purchased?

A. No, no.

Q. What did you purchase from Mr. DeArman, at the time you purchased from him?

Mr. Blakeney: We object to that as the other agreement would be merged into the written agreement and would be the best evidence.

Court: If there was a written agreement that would be the best evidence; my understanding is there was no written agreement. Let the objections be overruled. Plaintiff excepts.

A. Well, I bought what Mr. DeArman had out there; I bought his preference right and his improvements.

Mr. Blakeney: We move to strike out that part with reference to the preference right as being a conclusion of law.

Court: Let that be sustained; don't know what a preference right is myself. Defendants except.

A. I bought the improvements he had out there.

Q. What were those improvements?

A. Well, all he had out there; there was three or four barns.

Mr. Blakeney: We object; immaterial what he bought.

Court: Overruled. Plaintiff excepts.

A. Orchard, two sets of improvements, house, two wells, wind mill.

Q. How many trees were set out on the place at that time?

Mr. Blakeney: We object to that as immaterial.

Court: Overruled. Plaintiff excepts.

A. Something like 800.

Q. How old were those trees, approximately, at that time?

A. 500 of them was a year old.

Q. Did you put on any more improvements from the time you bought the lease from DeArman, up to 1915?

A. Very little; when one tree would die I would set out another.

Q. Did you out any other improvements, except to repair what was there?

A. Yes, sir.

Q. Just what were they?

A. Weatherboarded the house and painted it, put in overhead water, built fences, pulled stumps on the place and kept the place up.

Q. Were there another appraisalment made of your place after the 1909 appraisalment?

Mr. Blakeney: We object to that as immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. What year was that?

A. 1920.

Q. Were there one before that?

A. Must have been in 1915.

Q. Have you a copy of that appraisement?

A. No, sir; I haven't.

Mr. Boys: We now offer in evidence a certified copy of the appraisement of the land in controversy found in the files of the Office of the Commissioners of the Land Office, made 30th day of August, 1915, and ask that the same be marked Defendant's Exhibit "D" for identification.

Mr. Blakeney: We object for the reason it is irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

Exhibit "D" is received in evidence and is in words and figures as follows, to wit:

Appraisement of School Lands, Stephens County.

NE Qr. of Sec. 33, Twp. 1 South, R. 8 West, 160 acres.

Lessee Wm. T. Price. P. O. Comanche, R. F. D. 4.

This plat represents 160 acres.

Key to Plat.

Railway. -----

Streams. -----

Draws. xxxxxxxxxxxx

Spring S

House ()

Orchard oooooooooooooo

Pond P

Timber TTTTTTTT

Ledge of stone

Quarry))))))))

Public wagon road -----

TOPOGRAPHY

Rolling

Make a complete map of the land showing the location of improvements on the plat using the "Key."

1. Character, quality and depth of soil? Dark sandy soil 10 in. deep. Depth and character of sub-soil? Clay.
2. Is there any sand, shale, hardpan, gravel, alkali or Johnson grass? Describe fully, giving number of acres of same? No.

3. Any waste land? Yes. If so, how many acres? About 10 acres. (Show draws and canyons on plat.)
4. Is rock close to surface? Yes. Number of acres in this condition? About 25 acres.
5. If any cultivated lands were cleared and grubbed from brush, timber and stone, describe the extent and character of labor in preparing the same for cultivation. Yes, about 110 acres grubbed at cost of \$2.00 per acre.
6. Acres of prairie?----- Upland prairie-----
Prairie bottom?-----
(Show number of acres of upland or prairie bottom)
7. Does land overflow? Yes. State to what extent-----
Any improvements to protect the land from overflow?
If so, describe-----none-----
8. Acres of timber land? 40 acres of timber land (Give number of acres bottom or timber upland).
9. Kind and quality of pasture? Not very good—prairie grass.
10. How much timber land now in cultivation? None.
11. How much stony land? None. Kind and quality of stone? None.
12. How much land in cultivation? 110 acres—is tillable land in patches? Yes. If so, how many?-----3-----
Additional acres advisable to cultivate? None.
13. Estimate cost per acre of placing same in cultivation?---
14. State kind of vegetation growing on uncultivated land, kind of grass, timber or shrubbery, etc-----Prairie grass, post oak and black jack—some cotton wood and elm on dry branch.
15. If any lands not advisable to cultivate, can same be used for pasture? Yes. If so, what kind of pasture? Not very good.
16. State kind and quantity of timber. None except as above stated.
17. Any streams, natural lakes, ponds or springs? Yes. If so, describe. Dry Branch runs through the eastern side of farm.
18. Distance from market? 9 miles to Comanche and Duncan. Kind of roads? Good.
19. Any public parks or burial places? No. If so, describe. None.

20. Any school or church houses on land? No.
21. How much land suitable for townsite purposes? None.
22. Will this land bring more for townsite purposes than for agricultural purposes? No.
23. Does lessee reside on land? Yes. How far from school house? $1\frac{1}{2}$ miles.
24. Is neighborhood well settled? Yes. What class of people? White.
25. What crops raised in 1913 and 1914? Corn and cotton in 1913 and corn, cotton and oats in 1914.
Yield? Made 15 bu. corn, $\frac{1}{4}$ of a bale of cotton per acre in 1913 and 20 bu. corn, 1-3 of a bale of cotton and 25 or 30 bushels oats per acre in 1914.
26. What crops are growing on lands now? Cotton, corn and maize.
27. State condition of crops? Good.
28. Actual cash value of land? \$2,500.00.

Improvements.

Dwellings (describe fully) dwelling 16 ft. x 12 ft. with ell 14 ft. x 20 ft x 9 ft., boxed and shingle roof, 6 rooms and ceiled and papered; 2 rooms up stairs and 4 rooms down stairs, and 2 porches, \$600.00. Dwelling 28 ft. x 28 ft., boxed and shingle roof—4 rooms, \$250.00.

Condition now -----

Age ----- Value \$850.00

Barns (describe fully): Hay barn 14 ft. x 28 ft. x 7 ft., boxed and shingle roof, \$100.00. Barn and Granary combined, 14 ft. x 28 ft. x 6 ft. on side and board roof, \$65.00. Cow barn, 10 ft. x 10 ft. x 12 boards and board roof—loft for hay, \$50.00. Barn 22 ft. x 20 ft. x 10 ft., boxed and shingle roof, no value.

Condition now ----- Value \$215.00

Shed (describe fully) ----- condition now? ----- Age -----
Value \$-----

Granaries (describe fully) ----- Condition now? -----
Age ----- Value \$-----

Chicken Houses (describe fully): Chicken house 8 ft. x 24 ft. x 5 ft. boxed and shingle roof -----

Condition now ----- Age ----- Value ----- \$25.00

Closets, etc. (describe fully) ----- Condition now -----
Age ----- Value \$-----

Windmills, pumps and tanks (describe fully) ----- One 30 ft. tower and wind mill with 8 ft. wheel, \$60.00; one tank \$25.00;

one tank, \$20.00; one pump and 100 ft. pipe 1 1/4 in., \$20.00.

Condition now----- Age----- Value----- \$125.00

Fencing (describe fully): 1,060 rods barbed wire fence, 3 wire, and 200 rods woven wire hog fence, 32 in. high.

Condition now----- Age----- Value----- \$350.00

Drainage and irrigation ditches and artificial ponds (describe fully)----- Are same in useful condition now?

If same are in useful condition, what was the actual cost of construction? -----

Wells (describe fully): 1 bored well 33 ft. deep; 1 dug well 12 ft. deep. Value \$50.00.

Orchard (describe fully): 800 apple trees, 16 peach trees, 8 pear trees and 24 plum trees.

What is the present condition? Very good. Fair and reasonable value, \$800.00.

Describe fully, berries and small fruits----- Fair and reasonable value \$-----

Alfalfa and tame grass (describe fully) giving number of acres and yield per acre 1913, 1914-----

Condition----- Value \$-----

Miscellaneous: Smoke house 10 ft. x 12 ft. x 8 ft., boxed and shingle roof, \$40; hog crib 8 ft. x 8 ft. x 5ft., \$5.00; fair and reasonable value, \$45.00.

Cisterns, Cellars, Caves, Storm House, and Improved Springs (describe fully): One cave 6 ft. x 8 ft. 6 in., logs and dirt, \$20.00; one cave 8 ft. x 8 ft. x 7, logs and dirt, \$10.00. Are same in useful condition now? If same are in useful condition, what was the actual cost of construction? \$30.00.

Number of acres of land in cultivation at present time?----

What allowance should be made per acre for placing land in cultivation----- Timber----- Acres \$-----per

acre in cultivation----- years \$----- Brush-----

110----- acres \$2; grubbing 2----- Breaking per acre, in culti-

vation----- years \$----- Prairie----- Acres-----

\$----- per acre, in cultivation----- years

\$----- rocky----- acres \$-----

per acre, in cultivation----- years \$-----

Total for placing land in cultivation----- \$440.00

Total value of improvements----- \$2,930.00

Value of land----- \$2,500.00

Value of improvements----- \$2,930.00

Respectfully submitted, this 30th day of August, 1915.

T. C. CRENSHAW,

A. E. RAY,

GEORGE W. LEWIS,

Appraisers

I, the above named lessee, hereby accept the appraisalment and report, subject to the confirmation of the Commissioners of the Land Office.

W. T. PRICE,

Lessee.

I, A. S. J. Shaw, duly elected, qualified and acting Secretary to the Commissioners of the Land Office of the State of Oklahoma, and custodian of the records of said Commissioners, hereby certify that the attached copy of appraisalment is a true and correct copy of the appraisalment covering the land NW 33, 1S 8W, now on file in the office of the Commissioners of the Land Office.

Witness my hand and official signature at Oklahoma City, Oklahoma, on this the 30th day of November, 1920.

A. S. J. SHAW,

*Secretary to the Commissioners of the Land
Office of the State of Oklahoma.*

[SEAL]

Q. You accepted that appraisalment, did you not?

Mr. Blakeney: We object to that; irrelevant, incompetent and immaterial. And in addition the appraisalment shows that it is purely one for fixing the rental value of the land and made every five years for the purpose of fixing the rental value of the land and, under the law, the acceptance would have to be in writing.

Court: Overruled. Plaintiff: Exceptions.

A. Yes, sir.

Q. You did execute a lease in 1913, did you not?

A. Yes, sir, I think I did.

Q. You can't read, can you, Mr. Price?

A. No, sir.

Mr. Blakeney: We move to strike out that question whether he can read or not; no allegation here of any fraud and would be incompetent in this matter.

Court: Overruled. Plaintiff: Exceptions.

Q. Did you have any instrument—did you receive any instrument in writing from the School Land Board, from the time you sent the relinquishment in, in October, 1909, up to the time the lease was signed in 1913?

A. I wrote them when I sent them papers in what my improvements was appraised at.

Mr. Blakeney: We object to him stating the conversation in the letter as not the best evidence.

Court: Sustained.

Q. I am asking you whether you had a lease from the School Board, in writing, from the time you sent the relinquishment in up to 1913?

A. Not a one.

Q. Did you or not expect the land to be sold in the 1911 sale?

Mr. Blakeney: We object to that as irrelevant, incompetent and immaterial, as to what he expected.

Court: Objections sustained. Defendants excepts.

Q. Did you at any time; did you at all times insist that this land be sold.

Mr. Blakeney: We object to that; reason, it's immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. Did you have any conversation with the appraisers at the time the appraisement was made in 1915, as to whether or not, under this appraisement, the land would be sold?

Mr. Blakeney: We object to that; irrelevant, incompetent and immaterial; hearsay and was not made by a person authorized to make a sale of the lands.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. What statement, if any, did the appraisers make when they made the appraisement in 1915, whether that was an appraisement for sale purposes?

Mr. Blakeney: We object to that as hearsay and it is not shown that these appraisers had any authority whatever, by any statement made, to bind the State.

Court: Objections sustained. Defendants excepts.

Q. Mr. Price, at the time you accepted the 1915 appraisement, did you sign that under the representations made to you

at the time, that the land would be put up for sale on that appraisalment?

Mr. Blakeney: We object to that as irrelevant, incompetent and immaterial; they have introduced the acceptance and cannot impeach it.

Court: Objections sustained. Defendants except.

Q. Was your consent given to the 1915 appraisalment for the purpose of a sale of the land involved in this action?

Mr. Blakeney: We object to that as irrelevant, incompetent and immaterial.

Court: Sustained. Defendants except.

Q. Have you been ready, able and willing at all times, since the passage of the act of 1909, authorizing Section Thirty-three (33) to be sold, to buy this land?

Mr. Blakeney: We object to that as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. Did you go to the office of the Commissioners of the Land Office, some time during the first part of the year of 1920?

A. Yes, sir.

Mr. Boys: I don't think, if the court please, that I will go into this at this time unless the depositions of Mr. Stine are introduced in evidence.

Q. Mr. Price, you have paid the rentals on this farm since you have been on the place, have you not, with the exceptions of the year 1920?

Mr. Blakeney: We object to that, if the court please, as irrelevant, incompetent and immaterial; this is not an action to collect rentals and the rentals are not involved in this action.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. When was your note due for 1920?

Mr. Blakeney: We object to that as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. Fifteenth (15th) of October, 1920.

Q. That has not been paid?

A. No, sir.

Q. Are you willing, if the court should decree, that you pay this rental, to pay it?

A. Yes, sir.

Q. Do you remember receiving from the Commissioners of the Land Office, about 1st day of Jan. 1916, for execution, a lease with some notes?

Mr. Blakeney: We object to that; irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

A. I don't recollect.

Q. Did you execute any additional lease after the lease which has been offered in evidence, Jan., 1916, and the extension certificate, after that?

Mr. Blakeney: We object as irrelevant, incompetent and immaterial.

Court: Objections overruled. Plaintiff excepts.

A. No, sir.

Q. Have you received a lease recently, a blank form to be executed?

Mr. Blakeney: We object to that; irrelevant, incompetent and immaterial.

Court: I don't think that is material at this time.

Mr. Boys: Defendants offer to prove that during the pendency of this action the Commissioners of the Land Office have mailed a lease form to the witness for execution, together with promissory notes for the five year period, beginning January 1st, 1921, in which lease form it is provided that the witness has the preference right to purchase the land in controversy.

Mr. Blakeney: We object to that as irrelevant, incompetent and immaterial.

Court: Sustained. Defendants except.

Q. I hand you an envelope bearing post mark Oklahoma City, Oklahoma, date February 17th, 1921, addressed to W. T. Price, Comanche, Oklahoma; is that the envelope you received in this matter?

A. Yes, sir.

Q. I now hand you a letter marked by the stenographer Exhibit "G"; is that the letter you received in that envelope?

A. Yes, sir.

Q. I now hand you what purports to be a lease blank filled

out and ready for execution, on the land in controversy, and ask you if that was received by you through the United States mail, from the Commissioners of the Land Office?

A. Yes, sir.

Q. I now hand you what purports to be five (5) notes with the blanks filled out ready for execution, and ask you if those notes were received by you, and came in that same envelope?

A. Yes, sir.

Q. Did you receive this envelope in this same envelope?

A. Yes, sir.

Mr. Boys: We now offer in evidence the envelope, letter, notes, lease and return envelope, for the purpose of showing that the Commissioners of the Land Office are yet recognizing Mr. Price as a preference right lessee.

Mr. Blakeney: We want to object to that; the lease shows no such provision.

Court: When a case is tried before the court, without a jury, I am always liberal about letting in evidence; some judges may differ from me, but I don't think this is vital or material. Let the objections be overruled.

Mr. Blakeney: To which the plaintiff excepts.

DEFENDANTS' EXHIBIT "E."

Application No. 1497.

Preference Right Lease

Defendant's Exhibit "G."

Lease and Land Division

Commissioners of the Land Office

State of Oklahoma.

Make all remittances payable to A. S. J. Shaw

Secretary. Personal Checks not accepted

Oklahoma City.

Dear Sir:

We enclose herewith preference right lease, both copies to be signed by you and returned to this department.

This lease is not yet recorded in your name, but after you have signed lease and note and returned them to this department, provided other conditions of law have been complied

with, the Commissioners of the Land Office will approve this transfer and it will be recorded on our lease records.

After the proper authorities have signed in behalf of the State of Oklahoma, we will then mail you your copy of the lease.

Yours truly,
A. S. J. SHAW, *Secretary*.

Q. Did you say to them during any of these conversations that you didn't want that land to sell?

A. No, sir, I didn't.

Q. What did you say about the sale of this land?

A. Well, they came to see three times; they first sent a boy out there, said they wanted to go down in the cotton patch and put down a stob for a location and I said are you ready to pay and they said No, we can't pay for it; just some boys, said, Do you know Mr. Talley; and I said certainly; well, they said, you will have to see Mr. Talley. I said, No, Mr. Talley will have to see me. Mr. Talley brought his wife out there and she entertained my wife and we sit down on the gallery and talked.

Q. What did you say with reference to the sale, or wanting the land sold to these gentlemen; that is the question I asked?

A. I told them I always wanted it sold and they wouldn't sell it.

Q. You heard their testimony?

A. Yes, sir.

Q. They testified concerning some conversation you had with them about the sale of this land, not wanting it to sell?

A. They were mistaken just there; they were right and wrong, they just got the wrong sow by the ear, they got it wrong.

Q. Just explain?

A. Where they got it wrong, when I said I didn't want to sell, I said I didn't want to sell under that appraisement on my improvements; I said there were two men who were arranging to buy this place in if I signed this up, and when their adjusters came around I told them I wasn't willing to sell the way my improvements were appraised.

Q. You meant they were not high enough?

A. I know they wasn't; they wasn't half high enough.

Q. Now, your mental attitude was back in 1909?

A. Yes, sir.

Q. And they supposed you were talking about a later date?

A. Yes, sir, suppose so. I was willing to pay the other man's price for it.

Q. And you didn't take any appeal from that?

A. No, sir.

Q. Good many lessees let their land go?

Mr. Blakeney: Objected to; irrelevant, incompetent and immaterial.

Court: Sustained. Defendants except.

Mr. Boys: I believe that's all.

Mr. Blakeney: That's all.

Mr. Boys: We offer in evidence paragraph Three (3) of the Stipulation of Facts.

Mr. Blakeney: To which we object for the reason irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

(Paragraph 3)

The said land was leased by the duly constituted Board for leasing public lands during Oklahoma Territory days in accordance with the rules and regulations then duly promulgated, and by due and regular conveyance of right, possession and improvements passed from lessee to lessee down to and inclusive of L. P. DeArman, lessee.

Defendants now offer in evidence paragraph Four (4) of the Stipulation of Facts.

Mr. Blakeney: We object to paragraph Four (4) for the reason it's incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

(Paragraph Four)

That the said described land with other lands was reserved for the use of the Territory of Oklahoma and for the future State of Oklahoma by the President of the United States and by Act of Congress approved June 6, 1900, 31 Stat. at L. 680. That it is included within the common designation of public lands of the State of Oklahoma, that by Act of Congress of June 16, 1906, known as the "Enabling Act," the said lands were granted to the State of Oklahoma upon the conditions, limitations and covenants with respect to their control, disposition and sale therein set out. And, that the peo-

ple of the State of Oklahoma in Constitutional Convention assembled, irrevocably accepted the grant of said lands.

“For the uses and purposes and upon the conditions, and under the limitations for which the same are granted and donated, and the faith of the State is hereby pledged to preserve such lands and moneys, and all moneys derived from the sale of any of said lands as a sacred trust and to keep the same for the uses and purposes for which they were donated or granted.”

as set out in Section 1, Article 11 of the Constitution of the State of Oklahoma.

Mr. Boys: Defendants now offer in evidence paragraph Five (5) of the Stipulation of Facts.

Mr. Blakeney: We want to object to paragraph Five (5) as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

(Paragraph Five)

That the contractual obligations of the chain of lessees of said land up to and inclusive of L. B. DeArman, have been performed and the defendants contend that such obligations have been performed by them.

Mr. Boys: Defendants now offer in evidence paragraph Six (6) of the Stipulation of Facts.

Mr. Blakeney: We object to paragraph Six (6); irrelevant, incompetent and immaterial and is not the best evidence.

Court: Overruled. Plaintiff excepts.

(Paragraph Six)

That the lands herein described were on January 12, 1909, duly appraised at \$3,000.00 valuation and the improvements thereon appraised at \$1,290.00 valuation. That copy of appraisements and the approvals are hereto attached, hereby referred to and marked “Exhibit B” and “Exhibit B1.”

That the lands herein described were on August 30th, 1915, duly appraised at \$2,500.00 valuation and the improvements thereon appraised at \$2,930.00 valuation. That a copy of appraisement is hereto attached, hereby referred to and marked “Exhibit C”; and was duly approved as shown by “Exhibit C-1.”

That said defendants were qualified persons under the law to hold a lease upon said lands and qualified persons under the law to purchase the said lands and to avail themselves of the preference right to the lease and purchase thereof as provided by law.

That copy of an assignment from L. B. DeArman, predecessor lessee, to the defendant William T. Price, is hereto attached, hereby referred to and made a part hereof, and marked "Exhibit D."

That a copy of the lease issued to the said defendant William T. Price is hereto attached, hereby referred to and made a part hereof, and marked "Exhibit E," but that the original lease may be exhibited at the trial.

Mr. Blakeney: We object especially to Exhibit "B," "B-1" and for objections say that the same are irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

Mr. Blakeney: We object to that last clause just read by counsel, preceding and including Exhibit "C-1," referring to appraisement in 1915, as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

Mr. Boys: Defendants offer in evidence paragraph seven (7) of the stipulation of facts.

Mr. Blakeney: We object to paragraph seven (7) as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

(Paragraph Seven)

That at the time of the passage of the Enabling Act and approval thereof, to wit, on June 16, 1906, and at the time of the admission of the State and thereafter, as the proof may show, the said lands hereinbefore described were not known as mineral, gas or oil lands, except as set out in paragraph "12" herein.

Mr. Boys: Paragraph Twelve (12) is to follow paragraph Seven and we offer paragraph 12 in evidence.

(Paragraph 12)

That about the time of the institution of this action, a producing oil well was brought in on said section thirty-three (33) and rapid development of oil followed in the other three

quarters of said section thirty-three (33), and oil was produced therefrom and that on this date a number of producing oil wells are on said section.

Mr. Boys: Defendants now offer in evidence paragraph Eight (8) of the stipulations of fact.

(Paragraph Eight)

That the law may be considered as fully as though stipulated herein and without specific citation or reference or copying herein.

Mr. Boys: Defendants now offer in evidence paragraph Nine (9) of the stipulation of facts.

Mr. Blakeney: Plaintiff object to all the whole of section, or paragraph Nine (9) it being incompetent, irrelevant and immaterial, and objects separately to sub-division "a" and separately to sub-division "b", and separately to sub-division "c", and separately to sub-division "e", and separately to sub-division "f", and separately to sub-division "g", for the reason that each, all and every of said sub-divisions and also of said paragraph Nine (9) are incompetent, irrelevant and immaterial, referring to lands not involved in this action, but to other lands situated in the vicinity. We also especially object to the last of paragraph Nine (9) of plaintiff, which commences with the clause, "and other and similar land in the vicinity thereof, etc.," to the end of that paragraph for the reason it is incompetent, irrelevant and immaterial.

Court: Objections overruled. Plaintiff excepts.

(Paragraph Nine)

That, acting under the laws, the Commissioners of the Land Office of the State of Oklahoma, caused the other quarters in said section Thirty-three (33), and lands in the vicinity, to be appraised and advertised for sale purposes, as for example, to wit:

- (a) That on the 11th day of January, 1909, by the same authority, the Northwest Quarter ($\frac{1}{4}$) of said Section Thirty-three (33) was appraised as follows, to wit: Land \$3,000.00; improvements \$1,125.00, and sold by the State on the 19th day of January, 1911.
- (b) That on the 9th day of January, 1909, by the same authority, the Southeast Quarter ($\frac{1}{4}$) of Section Thirty-four (34) adjoining, was appraised as follows, to wit:

- Lands \$2,000.00; improvements \$697.00, and sold by the State on the 19th day of January, 1911.
- (c) That on the 9th day of January, 1909, by the same authority, the Southwest Quarter ($\frac{1}{4}$) of Section Thirty-four (34) adjoining, was appraised as follows, to wit: Lands \$2,600.00; improvements \$495.00, and sold by the State on the 19th day of January, 1911.
 - (d) That on the 9th day of January, 1909, by the same authority, the Northwest Quarter of Section Thirty-four (34) immediately adjoining said lands, was appraised as follows: Land \$2,600.00, improvements \$568.00, and sold by the State on the 19th day of January, 1911.
 - (e) That on the 11th day of January, 1909, the Northeast quarter ($\frac{1}{4}$) of Section Thirty-four (34) adjoining said land was by the same authority appraised as follows: Lands \$2,000.00, improvements \$695.00, and sold by the State on the 19th day of January, 1911.
 - (f) That on January 11, 1909, the Southeast Quarter ($\frac{1}{4}$) of Section Thirty-three (33) was, by the same authority, appraised as follows, to wit: Lands \$2,500.00, improvements \$510.00, and sold by the State on the 19th day of January, 1911.
 - (g) That on January 11, 1909, by the same authority, the Southwest Quarter ($\frac{1}{4}$) of said Section Thirty-three (33) was appraised as follows, to wit: Lands \$2,200.00, improvements \$602.00, and sold by the State of Oklahoma, on the 19th day of January, 1911.

Mr. Boys: Defendants now offer paragraph 14 of the stipulation in evidence.

Mr. Blakeney: Plaintiff objects as irrelevant, incompetent and immaterial. I want to insist that is not competent for any purpose. I want to make my objections to the first sentence, that the amount involved in this controversy is more than five thousand (\$5,000.00) dollars.

Court: Overruled. Plaintiff excepts.

(Paragraph 14)

That the amount involved in this controversy is more than Five Thousand Dollars (\$5,000.00). That there is no adequate, speedy or sufficient remedy at law for either of the parties hereto.

Mr. Boys: Defendants now offer in evidence paragraph 15, of the stipulations in evidence.

Mr. Blakeney: We object for the reason it is incompetent, irrelevant and immaterial, and because the same is a legal conclusion and not of any fact.

Court: Overruled. Plaintiff excepts.

(Paragraph 15)

That the said contract "Exhibit F" mentioned in paragraph 10 hereof, was executed without any settlement with defendants or either of them, or any disposition or alienation by defendants of their rights, if any they have, to, on or in the said lands.

Mr. Boys: Defendants now offers paragraph Sixteen (16) of the stipulation of facts, in evidence.

Mr. Blakeney: We object to that as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

(Paragraph 16)

That defendants claim that the purported oil and gas contract "Exhibit F" aforesaid, and the purported action of said Board set out in Paragraph 11 hereof was void and without authority of law, and in violation of defendants' constitutional rights, and protection; and plaintiff claims that the same was executed with authority of law and is valid; but it is expressly agreed that either party shall have the right to urge any other claim or right or defense within the issues.

Mr. Boys: Defendants now offer paragraph Seventeen (17) of the stipulation of facts, in evidence.

Mr. Blakeney: We object to paragraph Seventeen (17) for the reason it is irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

(Paragraph 17)

That defendants have never at any time surrendered, alienated, sold or abandoned any right to, or interest in, said land and all of them, held by them as lessees aforesaid, under the law. Defendants claim that any act of the Board of School Land Commissioners and of the plaintiff complained of in their answer and cross petition, does, as to these defendants, violate the Fifth and Fourteenth Amendments to the Con-

stitution of the United States, and does take defendants' property without compensation and without due process of law, and in impairment of their contract.

Mr. Blakeney: We want to object specially to the first sentence of paragraph 17, and want to object specially to all paragraph 17, subsequent to the first sentence, as being irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

Mr. Boys: Defendants now offers paragraphs Eighteen (18) of the stipulation of fact, in evidence.

Mr. Blakeney: We object to that paragraph as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

(Paragraph 18)

That the defendants claim the protection of the Constitution of the United States and the Amendments thereto, and particularly the Fourteenth Amendment, and claims that they have the right to invoke the vested jurisdiction of the Court, and, in due course, of the Supreme Court of Oklahoma, and if necessary, ultimately of the Supreme Court of the United States for the protection of any rights of said defendants and each of them and of their liberty and property in the Northeast Quarter ($\frac{1}{4}$) of Section Thirty-three (33), Township One (1) South, Range Eight (8) West, in Stephens County, and of their equal protection of the law, and for due process of law.

Mr. Boys: Defendants now offer paragraph Nineteen (19) of the stipulation of facts, in evidence.

Mr. Blakeney: We object to the paragraph 19, for the reason incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

(Paragraph 19)

It is further stipulated and agreed that in 1875 these lands and surrounding lands were surveyed into sections and quarter sections and the corners thereof marked by permanent monuments by authority of the Government of the United States, and at all time herein mentioned, remained surveyed lands, were known as surveyed lands.

Mr. Boys: Section 21 of the stipulations of agreement is to be introduced by agreement, and reads as follows:

(Section 21)

It is further stipulated that any fact admitted by the pleading may be considered in addition to this stipulation, if competent, relevant and material to the issues framed. That either party reserves the right to object to the consideration of any fact stipulated herein as incompetent, irrelevant or immaterial, and either party may, in addition, introduce evidence or testimony not inconsistent with the agreements of this stipulation.

Either party may offer such parts or portions of this stipulation as such party may desire, subject to objections for incompetency, irrelevancy or immateriality.

Mr. Boys: Defendants now desire to offer a certified copy of a lease from the Territorial Board to William T. Click, to the land involved, and dated January 8th, 1902, and now ask that the same be marked Defendants' Exhibit "H".

There being no objections made to the introduction of said Exhibit "H" of defendants, same was received in evidence and is as follows, to wit:

Renewal of Lease—School Land—for 16 and 36 and 13 and 33.

This Indenture, made by and between Thomas B. Ferguson, as Governor, William Grimes, as Secretary, and L. W. Baxter as Superintendent of Public Instruction of the Territory of Oklahoma, constituting a board for leasing land reserved for school and public purposes in the Territory of Oklahoma, parties of the first part, and William T. Click, party of the second part, witnesseth: That the said parties of the first part, by virtue of the authority vested in them by Act of Congress approved May 4, 1894, and the regulations prescribed by the Secretary of the Interior, therein provided for, and in consideration of the covenants of the said party of the second part hereinafter set forth, have this day leased to the said party of the second part the following described School Land, to wit: The NE of Section 33, Township 1 S., North of Range 8 W. of the Indian Meridian, in Comanche County, Oklahoma Territory, to have and to hold the same for the term of three years from the first day of January, 1902, to the first day of January, 1905, for which said party of the second part hereby agrees to pay therefor the sum of----- dollars, cash in hand, and the receipt whereof is hereby ac-

knowledge, and twenty-five dollars on the 1st day of October, 1902, and twenty-five dollars on the 1st day of October, 1903, and twenty-five dollars on the 1st day of October, 1904.

The said deferred payments are evidenced by three certain joint, several promissory notes of even date herewith, signed by said party of the second part and two sureties for the above amount, due and payable at the time above set forth.

The said party of the second part covenants with the said parties of the first part, that he will not cut or remove, or permit to be cut or removed, any timber from said land; that he will not quarry or remove, or permit to be quarried or removed, any building or other stone from said land, except such as may be necessary for the foundations for buildings thereon; that he will not mine or remove, or permit to be mined or removed, any minerals therefrom; that he is leasing said land for agricultural and grazing purposes, and that he will cultivate the same in a husbandlike manner; that he will not assign this lease, or underlet any portion of the leased premises, and that he will not commit any acts of waste upon or to said land.

It is further agreed by and between the parties to this lease that the said party of the second part may, at the expiration of the time for which this lease is made, remove any or all of the improvements he may have placed upon said land, unless the said party of the second part shall be in default for payment of said rentals, or a part thereof, or has violated any of the conditions herein.

If default is made in the payment of said rental, or the conditions of this lease have been violated, the improvements upon said land, and the growing crops thereon, shall not be removed by the said party of the second part, or any one claiming under him, until such rental has been fully paid, together with interest, costs, damages, and attorney's fees arising from the violation of the conditions of this lease, and such unpaid rental, interests, costs, damages, and attorney's fees aforesaid, shall become a lien upon the improvements on said land, and the growing crops thereon, and such improvements or growing crops may be sold at public or private sale by the said parties of the first part, or their successors in office, without notice to the said party of the second part, and the proceeds of such sale applied to the satisfaction of the unpaid part of said rental, and in satisfaction of damages, interest, costs and attorney's fees as aforesaid.

It is expressly understood by and between the parties to this lease, that upon the non-payment of said rental or any part thereof at the time the same shall become due and payable, or upon the failure or refusal of the said party of the second part to furnish additional security for any deferred payments, when requested so to do by the said parties of the first part, or their successors in office, or if the said party of the second part shall fail in any manner to comply with the provision of this lease, or violate any of the conditions thereof, the said parties of the first part, or their successors in office, may, at their option, declare this lease forfeited, and the said parties of the first part or any other person lawfully entitled to the possession thereof on behalf of, or representing the United States, or the Territory of Oklahoma, shall have the right to take immediate and peaceable possession of said premises, together with the improvements and growing crops thereon situated. And upon the termination of this lease, either by the expiration of the time for which the lease is made, or by reason of the violation of any of the conditions hereinbefore set forth, any instrument in writing, signed by the said parties of the first part, their successors in office, showing that the person or officer named therein is entitled to the possession of the land, or that he takes possession of the improvements and growing crops thereon on behalf of the United States or the Territory of Oklahoma, shall be sufficient authority for such person or officer to take possession of the land, and to take possession of and sell the improvements and growing crops thereon, for the purpose of paying any part of said rental due and unpaid, with interest, costs, damages, and attorney's fees, as hereinbefore provided for.

If the party of the second part desires to re-lease said land at the expiration of the time for which this lease is made and files his application therefor with the said party of the first part, or their successors in office, whenever public notice is given that the bids will be received, and has complied with all the conditions herein, he will be given a preference right to re-lease said land at the appraised rental value thereof as fixed by the Board of Leasing School Lands, but the right is reserved by the said parties of the first part to reject all bids.

If, at any time the execution of this lease, it is shown to the satisfaction of the parties of the first part, or their successors in office, that there has been any fraud or collusion upon the part of the said party of the second part to obtain this

lease at a less rental than its value, it shall be null and void at the option of the parties of the first part.

Executed in duplicate.

Witness our hands and seals of the parties aforesaid this 8th day of January, 1902.

T. B. FERGUSON, [SEAL]

Governor

WILLIAM GRIMES [SEAL]

Secretary.

L. W. BAXTER, [SEAL]

Superintendent of Public

WILLIAM T. CLICK,

Lessee

Witness:

J. R. GATES, JR.

W. R. GREEN.

I, E. P. Bryan, duly elected, qualified and acting Secretary to the Commissioners of the Land Office, of the State of Oklahoma, and custodian of the records of said Commissioners hereby certify that the attached copy is a true and correct copy of the original now on file in the office of the Commissioners of the Land Office.

Witness my hand and official signature at Oklahoma City, Oklahoma, on this the 16th day of June, 1920.

E. P. BRYAN,

*Acting Secretary to the Commissioners of
the Land Office of the State of Oklahoma.*

[SEAL]

Mr. Boys: We also desire to offer in evidence a certified copy of the lease executed to W. T. Click, Jan. 21, 1905, and ask that the same be marked Exhibit "1."

There being no objections made to the introduction of Exhibit "1" the same is received in evidence and is as follows, to wit:

Mr. Boys: We desire to offer in evidence a certified copy of Extension Certificate under date of Dec. 31st, 1908, which shows that the lease had been assigned and relinquished on the 18th day of August, 1908, from William T. Click to De Arman, and ask that the same be marked Exhibit "1" and

offer the same in evidence. There being no objections said certificate is received in evidence, marked Exhibit "1" and is as follows:

Mr. Boys: We now offer in evidence a certified copy of a lease from Commissioners of the Land Office to Mr. Price, and under date of 2nd day of January, 1913.

There being no objections to the introduction of the lease under date of January 2, 1913, same is received in evidence and marked Exhibit "J" and is as follows:

Lease for Public Lands of the State of Oklahoma.

This lease made by and between the Commissioners of the Land Office of the State of Oklahoma, a commission having charge of the sale, rental, disposal and management of the school and other public lands of the State of Oklahoma, and acting for and on behalf of said State, and hereinafter designated as parties of the first part, and William T. Price, of Comanche, and hereinafter designated as party of the second part, witnesseth:

That the parties of the first part by virtue of the authority vested in them by the Constitution and Laws of the State of Oklahoma, and in consideration of the covenants of the said party of the second part hereinafter set forth, hereby lease and let unto the said party of the second part the following described public land granted to said State by the Congress of the United States, to wit:

The NE Quarter of Section 33, Township 1 South, Range 8 West of the Indian Meridian, in Stephens County, State of Oklahoma, to have and to hold the same for a period of two years from the first day of January, 1913, to and including the 31st day of December, 1914, provided, however:

This lease is made subject to the rights of the State of Oklahoma, to sell and convey the land herein described at any time, and that upon such sale, if any be provided by law prior to the expiration of this lease, the same shall thereupon expire, and the party of the second part as lessee of said land shall be entitled to purchase the same at the highest bid, subject to such conditions, limitations, restrictions, and exceptions as may be provided by law.

And as a consideration for the leasing of said land, the said party of the second part hereby agrees to pay to the said

parties of the first part, as rent therefor, the total sum of One Hundred Thirty-one and no/100 dollars, in installments as follows:

Sixty-five and 50/100 Dollars for the first day of October, 1913.

Sixty-five and 50/100 Dollars for the first day of October, 1914.

The said deferred payments are evidenced by two certain promissory notes of even date herewith and payable as above specified and signed by said party of the second part as principal and one qualified person a resident of said state, as surety.

And as a security for the payment of the above described notes at the time the same are due and payable the party of the second part hereby expressly grants and gives unto the State of Oklahoma, a first lien upon all crops and improvements now located or which may be placed or made upon said land during the term of this lease.

Said party of the second part may at the termination of this lease remove any or all of his improvements, and he shall have the right to harvest or remove any growing crop on said land, provided, however, that in case said party of the second part is in default for non-payment of any rental or assessment of any nature, he shall not be allowed to remove such improvements, or make such entry to secure crops until all arrearage is fully satisfied, said improvements that are movable, shall then be moved immediately within sixty days from termination of this lease.

I, the said party of the second part shall be in default of the usual rental due the state for a period of three months and such delinquency is not paid within thirty days from the time of service of notice, the parties of the first part shall declare this lease forfeited and the lands herein described shall revert to the State of Oklahoma the same as though this lease had never been made, provided, however, in case of forfeiture as provided by Section 6 of Chapter 118, Session Laws of the State of Oklahoma of the year 1910, the party of the second part has the right of redemption by paying all delinquencies, fees and costs of forfeiture at any time before such land is advertised to be leased. The improvements not located or which may hereafter be placed on said described land in case of forfeiture and reverting of said lands to the State as by

law provided shall be sold under the directions of the Commissioners of the Land Office at public or private sale, upon due notice to the party of the second part and the proceeds received therefrom shall inure to the said party of the second part after payment shall have been made for all delinquencies and rents and expenses incurred in making such sale.

The party of the second part hereby agrees and obligates himself that he will not cut or remove, or permit to be cut or removed any timber from said land, that he will not quarry or permit to be quarried any building or valuable stone from said lands, that he will not mine or move, or permit to be mined or moved, any minerals therefrom, and that he will not remove or take from said land any sand or gravel or other deposits of like character without first obtaining written authority so to do as the Laws of the State provide. The party of the second part hereby agrees, binds and obligates, that he is leasing said land for agricultural and grazing purposes and that he will use and occupy the same for no other purposes and that he will care for and cultivate the same in a husband-like manner and that he will protect said land from waste and that he will not permit or suffer any waste or trespass to be committed on or against said land. The said party of the second part hereby agrees, binds and obligates himself that he will not assign, transfer, or relinquish this lease and his interest therein and his interest in his improvements without the consent and approval of the said parties of the first part and that he will not sub-let or underlet the said land or any part thereof without the written permission being first obtained from the said parties of the first part.

And it is hereby agreed that the said party of the second part shall have the preference rights to re-lease said land as provided by the laws of said State. If at any time after the execution of this lease it is shown to the satisfaction of the parties of the first part that there has been any fraud or collusion upon the part of the said party of the second part to obtain the same, said lease shall be declared null and void at the option of the parties of the first part.

And it is hereby expressly agreed and understood that a violation of any of the terms and conditions of this lease, or the laws of the State of Oklahoma, concerning the public lands of said State by the said party of the second part shall subject this lease to cancellation and upon proof of the violation of

any of the terms of said lease or said laws being made to the Commissioners of the Land Office of the State of Oklahoma, such Commissioners of the Land Office shall have the right to cancel and declare the same null and void and of no effect and take possession and re-lease the same as by law provided.

This lease is executed in duplicate.

In Witness Whereof the said parties have caused their signatures to be subscribed hereto on this 2nd day of Jan., 1913.

COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA,

LEE CRUCE,

Chairman.

WILLIAM T. PRICE,

Lessee.

Attest

JOHN R. WILLIAMS,

Secretary.

STATE OF OKLAHOMA,

Stephens County, ss.:

Before me, G. W. Yeager, a Notary Public in and for said County and State on this 13th day of Jan., 1913, personally appeared William T. Price, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purpose therein set forth.

G. W. YEAGER,

Notary Public.

[SEAL]

My Commission expires Nov. 13, 1916.

Mr. Boys: We now desire to offer in evidence a certified copy of the Rules and Regulations, approved by the Secretary of the Interior for the leasing of lands during the Territorial days, same being the rules that were in force under Act of May 4th, 1891, and afterwards approved by Act of May 4th, 1894, and ask that the same be marked Defendant's "Exhibit L."

Mr. Blakeney: We object to the introduction of Exhibit "L" as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

Defendants' Exhibit "L" is received in evidence and by the Court Reporter marked Exhibit "L" and reads as follows:

*United States of America
Department of the Interior.*

Washington, D. C., December 1, 1920

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annex papers, being a letter from the Commissioner of the General Land Office, dated March 19, 1891, with accompanying form of lease, and a letter dated March 20, 1891, addressed to the Governor of Oklahoma, are true copies of the originals as they appear on the records and files of the Department.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

S. G. HOPKINS,
Assistant Secretary of the Interior.

[SEAL]

*Department of the Interior
General Land Office*

Washington, March 19, 1891

Address only the
Commissioner of the
General Land Office.
The Honorable

The Secretary of the Interior.

Sir:

I have had the honor to receive two letters to your address from the Honorable George W. Steele, Governor of the Territory of Oklahoma, to one dated the 9th and the other the 10th instant, having reference to the provisions contained in section 36 (not 32) of the Indian Appropriation act of March 3, 1891, for the leasing of the school lands reserved in said Territory, on the first mentioned of which I find your endorsement dated the 13th instant, as follows, viz:

Referred to the Commissioner Gen'l Land Office who will please give this matter his immediate attention and report his views, and the proper forms to carry this act into effect. Let it have preference of other business.

The said section reads as follows, viz:

"Sec. 36.—That the School lands reserved in the Territory of Oklahoma, by this and former acts of Congress, may be leased for a period not exceeding three years for the benefit of the school fund of said Territory by the Governor thereof, under regulations to be prescribed by the Secretary of the Interior."

The duty of this office with regard to the reserved school sections is limited to observing the reservation thereof as directed in the statutes, and, as far as possible, protecting them from injury, with a view to their ultimate appropriation by grant, for the support of schools, when the title passes by operation of the law making the grant.

The records of this office consequently afford but little information on the subject of these actions. The Governor is doubtless, from his position, well advised on the subject, and he is charged by the statute with the duty of making the leases. Hence, I am of the opinion, that his representations made in the two letters above mentioned are entitled to great, if not controlling consideration.

I quote from his letter of the 9th as follows, viz:

"To the end of settling the many contentions existing which have arisen over the Territory, as to who is the rightful occupant of the said lands, and more particularly with a view to giving opportunity of preparing the ground for crops the coming season, and it is proper for me to add that the thrifty farmers are all either done breaking their ground, or are engaged in doing so now, and within a week or two weeks at farthest, planting will begin here actively. There is a difference of opinion even among those occupying the lands, as to how the leases should be made, some think the land should be appraised and give occupants the opportunity of taking them at the appraisement; while others think they should be let to the highest bidder and occupants have the preference to take said lands at the highest bid; then would come the question as to who was the occupant, and in my

opinion if the latter should be decided to be the proper course, the Governor should have the power to decide the question peremptorily, so as to avoid litigation. It will not, of course, be pleasant to the Governor; it will be a nuisance to him, unless he can have power to call to his assistance either some of the Territorial officers or some of the agents of your Department to assist him; however, it was not my intention to make any suggestions in regard to the making of the 'regulations' to be prescribed, but to remind you how important it is to provide for the leasing of these lands at a very early date, so that our crops may be out of the way before the hot season arrives, and the Territory receive a correspondingly higher price for the use of lands obtained in time for the spring crops. I hope also that some arrangements may be made whereby I may have proper clerical assistance; records will have to be made of these leases, and it seems to me the Territorial Auditor should make the record."

I quote also from the Governor's letter of the 10th as follows, viz:

"I feel that it will expedite matters for me to say to you with reference to the regulations you are to make for leasing the school lands in this Territory, that there is much difference in the value of the sections, for instance, here lying up against the town in one section of very good land, and because it is near the city ought to bring more money than a stony knob (and there are few of those) eight or ten miles out, with no water on it; then there are different classes of settlers on these lands, those having my greatest sympathy went onto the school land sections believing that they were lands subject to entry, not knowing they were school sections until they came to make their filings in the land office, and in the meantime all the desirable land in the Territory had been taken up and these settlers having no place to go, or perhaps being unable to go, have remained there and have improved the school sections where they resided; then there is another class of settlers who have come into this country owing to the good advertising it had, thinking there were lands open for settlement, but finding none unoccupied excepting the school sections, and being un-

able to go farther on or to return, were forced to settle upon the school lands, as on account of the numerous contests the first settlers were unwilling to allow these men to even camp upon their lands, hence they have remained and have improved the school sections and have my sympathy.

In some cases and in fact in a great many cases, more than one of these families have come in and settled upon the same quarter section.

Now, aside from these settlements there are a great many people who have lived next to the school sections; many people who have cultivated their own land to some extent and in many cases have cultivated their own land well and have also put improvements upon the school sections with a view of holding it for some friend or relative, and they have even gone onto sections where the first and second class mentioned have made improvements and have tried to drive them off, failing in this have plowed land along side of that already plowed; then, non-residents have come in and built fences around these sections where there is water, and have either put their own stock on the lands for grazing or have rented them to others.

The 'Bulldozers' are those from whom we may expect the most trouble, that is men who have gone onto these lands since they were occupied by others, and at any opportunity given them, harass the men who wants to make a home you may rely upon their doing so, hence my suggestion yesterday that a clause in the regulations should recite in express terms that a decision will be final, I mean that whoever the Governor decides is entitled to the land, will get it, excepting an appeal may go to the Secretary.

Where an investigation is had and it is ascertained that a man has gone first upon the land in good faith and in good faith has taken steps to maintain his family thereon, and it is decided such a man shall have any preferences no 'Bulldozer' should be able to come in and by false affidavits or litigation prevent him from going on and raising his crop.

Unless an appraisalment is made of all the land in the Territory I don't see how it can be decided better than by either receiving open or sealed bids for the use of these lands, giving the man who has occupied the land in good

faith and has shown his faith by his work, a preference of taking it at the highest bid; and authority should also be conferred to reject any or all bids, if it should be found there is a collusion among settlers to prevent the lands leasing at a fair value; then will come the question of payment, and there are few who can pay in advance, and for agricultural purposes. It is not expected much profit will result from the first year's labor, nor for that matter the first two years. If they could pay at the end of the first year (giving the best security we can obtain to do so) with a forfeiture clause at the end of the first year or the second year if payment is not made, and requiring pre-payment for the third year, I believe it would be as fair for both the settlers and the Territory as could be asked.

It seems to me there ought also to be a clause giving the lessee preference where a new lease is to be made, at the end of the third year, if one is made, provided he has cultivated the land in a business like manner.

After again impressing upon you the importance of early action in prescribing the regulations necessary with a view to the farmers getting to work, I am, &c &c."

In reference to the subject, I have to report my views as agreeing substantially with those above quoted from the Governor's letters, and would suggest that the Honorable Secretary communicate with the Governor and prescribe regulations to the effect following, viz:

1st. The Governor shall execute the leases according in general with forms ordinarily in use, but containing a reference to the authority under which he acts, and describing the lands according to the legal subdivisions of sections, township and ranges, for such periods as he may deem best, in the several cases, not exceeding three years in any. I enclose draft of a form deemed suitable.

2nd. The quantity of land to be leased to any one person shall not exceed one quarter section.

3d. Sealed bids shall be received after proper public notice to be given in the manner deemed by the Governor the best practicable under the circumstances, and the lease to be awarded to the actual bidder at the highest amount of rent bid—in each case.

4th. In the event of controversy as to priority of settle-

ment, a hearing shall be allowed by the Governor, testimony taken and decision rendered by him, without unnecessary loss of time, and subject to appeal to the Secretary of the Interior within fifteen days from notice.

5th. The periods of payments of rents shall be fixed in the leases by the Governor at his discretion according to the circumstances of each case, with security satisfactory to him to be required for the payment thereof when due, should he deem it necessary, and forfeiture to be provided for in case of failure.

6th. The leases shall be forwarded to the Secretary for his approval before being executed by the Governor, to be accompanied with a report from him setting forth the material facts of the case for the Secretary's consideration.

7th. The lease shall be recorded by the Secretary of the Territory according to the provisions of the 3rd section of the Act of May 2, 1890, pamphlet statutes, page 82-85.

8th. In case a new lease is to be made at the end of the third year, the preference shall be given the former lessee, if the Governor finds that he cultivated the land in a business like manner, and fulfilled the term of the lease in good faith.

9th. Any moneys received by the Governor on account of rents of such lands shall be accounted for and deposited as public money according to law. Title XL, Revised Statutes.

10th. The precise forms and methods of proceedings shall be left to the judgment of the Governor, subject to the general rules above given.

It would appear that the Governor will require some clerical assistance, and that some expense will have to be incurred in connection with the business. I am not able to find any statute providing thereof, unless the money appropriated for contingent expenses of the Territory, viz, \$1,500 for the current fiscal year by Act of July 11, 1890, pamphlet statutes, page 249, and \$1,500 for the next fiscal year, by act of March 3, 1891, can be made to answer.

The Governor's said letters are herewith returned.

Very respectfully,

(Signed) W. M. STONE,

Acting Commissioner.

11-1MD COPY

Form of Lease.

This lease, made this-----day of----- between-----

-----, Governor of the Territory of Oklahoma, representing the United States, by virtue of the 36th section of the Act of Congress of March 3, 1891, and the regulations prescribed by the Secretary of the Interior therein provided for, of the first part, and----- of the second part, witnesseth:

That the said party of the first part doth hereby lease and convey unto the said party of the second part, the following described tract of land, viz: the----- of Section----- in Township----- of range----- of the Indian Meridian, in Oklahoma Territory:

To hold for the term of-----years from the date hereof;

Yielding and paying therefor yearly the sum or rent of -----payable (here set forth the time and terms of payment).

Any failure to pay the rent hereinbefore reserved when due to produce an absolute forfeiture of this lease.

The lease of said tract of land, or any part of it is not assignable, nor is the said tract, or any part of it to be underlet, under penalty of forfeiture.

And the said party of the second part covenants: That he will pay the said rent in manner aforesaid;

That he will not do or suffer any waste in the demised premises;

That he will deliver up the premises to the said party of the first part, or his successor in office, or other party lawfully entitled to possession thereof and on behalf of or as representing the United States, peaceably and quietly at the end of the said term.

In witness whereof, the said parties hereunto set their hands and seals.

(Signature) -----[SEAL]

(Signature) -----[SEAL]

F. A. W.

Department of the Interior,
Washington

March 20, 1891.

The Governor of Oklahoma,
Guthrie, Oklahoma.

Sir:

I have the honor to acknowledge the receipt of your letters

of the 9th and 10th instants offering suggestions and asking instructions relating to the leasing of school lands in the Territory of Oklahoma.

In reply thereto I enclose herewith a copy of the report to me by the Acting Commissioner of the General Land Office dated yesterday, embodying his views and proposing certain regulations in the premises. I have approved the recommendations of the Acting Commissioner.

Any amendments you may suggest, which may be found best in practice, may be submitted for my future consideration.

Very respectfully,

GEO. CHANDLER,

Secretary.

2704-91

11-2 aw.

EMD.

Mr. Boys: We now offer in evidence the depositions of Scott Stine, admitting the formal part of it.

Direct examination by Mr. Boys:

SCOTT STINE being first duly sworn to testify to the truth, the whole truth and nothing but the truth, in answer to interrogatories propounded, testified as follows, to wit:

Q. State your name?

A. Scott Stine.

Q. What is your official position?

Mr. Merritt: We object to the introduction of any evidence on behalf of the State as incompetent, irrelevant and immaterial.

Court: Overruled. State excepts.

Mr. Ambrister: We object to the introduction of any evidence on behalf of the Magnolia Petroleum Company as incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

A. Chief Clerk of Lease and Land Division.

Q. As such Chief Officer, or Clerk of the Land and Lease Division, do you have the care and custody of the records of the office of School Land Commissioners, of the State of Oklahoma, covering the leasing of the public lands and the sale of the public lands?

A. Yes.

Q. I will ask you if you have the records showing the payment of rentals on the Northeast $\frac{1}{4}$ of Section 33, Township 1 South, Range 8 West?

A. I do.

It is agreed between the parties that the rentals on the above described land and tract of land were paid from the time of the first leasing, 1902, down to, and not including 1920. And that the defendant Price has paid his rentals promptly from the year 1909, to the year 1919, inclusive. That the rentals for the year 1920 were not due until October 1, 1920, as shown by the records of the Commissioners of the Land Office, and that at no time has there been any effort on the part of the Commissioners of the Land Office to forfeit on the Commissioners of the Land Office, any lease on said premises or to foreclose thereon.

Q. Does your records show whether or not at any time the Commissioners of the Land Office of the State of Oklahoma have forfeited or foreclosed or otherwise acquired the interest of the lessee to this land?

By Mr. Merritt: Objected to as incompetent, irrelevant and immaterial.

Court: Overruled. State excepts.

A. The records do not show any such action taken by the Commissioners of the Land Office.

Q. Mr. Stine, do you have in the files of the Commissioners of the Land Office, the published advertisement for the sale of lands in Section 33 and Indemnity Land in Stephens County, Oklahoma?

A. No such copy of the advertisement on file in this office that I know of.

Q. Now, Mr. Stine, do you have in your files of the Commissioners of the Land Office, one of the pamphlets that you sent out for the sales held during 1910-1911 that included the sale of Section 33 and Indemnity Lands in Stephens County?

A. I think so.

Q. Could you make a search, and if so attach one of those to your deposition and mark it "Exhibit A," if we desire it?

A. I think I can. (Witness reports cannot find pamphlet.)

By Judge Sharp:

Q. Mr. Stine, referring to the pamphlet issued by the Commissioners of the Land Office for the sale of the lands in Jefferson, Stephens, Grady, Caddo, Comanche, Kiowa and

Custer Counties, comprising the Fifteenth Sales District of the State of Oklahoma, I notice that none of Sections thirty-three in Jefferson County, and but two quarters sections in Stephens County, including the Price Quarter Section, and but three quarters sections in Grady County; three in Caddo County and but approximately six quarter sections in Comanche County—that is, by “quarter sections” I mean the sub-division of section 33—were advertised for the sales commencing February 21, 1916, and ending March 14, 1916, in the Fifteenth Sales District of the State. I will ask you if it is not true that prior to the date of the sales advertised for February and March, 1916, all others of sections 33 in the five counties last named have not been sold, and if the records of your office do not so show?

By Mr. Ambrister: Objected to as incompetent, irrelevant and immaterial, not pertaining to any issue in the trial of this case and not within the personal knowledge of witness.

Court: Overruled. Plaintiff excepts.

A. I do not know.

Q. Will you examine the records, Mr. Stine and be able to give us an answer to the question at the time of our reconvening tomorrow morning?

A. Yes.

Q. I notice in the advertisement, or in the pamphlet sent out by the Commissioners of the Land Office of the sale that was held in 1911, to wit, on January 18, 1911, that the northwest quarter section, the southwest quarter section and the southeast quarter section of Section 33, Township 1 South, Range 8 West were all advertised for sale. Do you know whether or not those lands were sold on that date, and if so whether or not they were sold to the lessees thereon at the appraised value?

A.

Q. Also whether or not the four quarter sections in section 34, Township 1 South, Range 8 West were not advertised on the same day and sold to the respective lessees at the appraised value, and also in this connection to ascertain whether or not Section 34 last referred to was indemnity or lieu land?

A.

Q. Mr. Stine, I will ask you to state if in the matter of making sales, the practice had not been for the sales force in

the office to make up generally a list of unsold lands and to advertise all such lands for sale?

By Mr. Merritt: The State objects as incompetent, irrelevant and immaterial, and for the further reason that the office force had no practice or custom, and they only acted by direction of the Commissioners of the Land Office who only acted after action by the Legislature, and that the Statute authorizing the sale shows what lands should be sold.

Court: Overruled. Exceptions.

By Mr. Ambrister: The Magnolia Petroleum Company objects as incompetent, irrelevant and immaterial, and for the further reason that the office force had no practice or custom and that they only acted by direction of the Commissioners of the Land Office who only acted after action by the Legislature, and that the Statute authorizing the sale shows what lands should be sold.

Court: Overruled. Plaintiff excepts.

Q. (By Judge Sharp) I will supplement the last question, as the practice referred to, was not that followed under the direction of the Chief Officer in charge of the advertisement and sale of unsold public lands, and that if the instructions to sell such unsold lands were not given in the first place by the Commissioners of the Land Office?

Mr. Ambrister: The Magnolia Petroleum Company further objects because not within the knowledge of the witness; not shown he was connected with the Commissioners of the Land Office at the time referred to in the question.

Court: Overruled. Plaintiff excepts.

Whereupon time for adjournment having arrived, it was agreed by and between the parties that further taking of testimony may be resumed at nine o'clock on March 2, 1921. Adjourned.

Now, on this second day of March, 1921, all parties appearing as heretofore, the following testimony was produced:

Mr. Stine called:

By Judge Sharp:

Q. Mr. Stine, are you prepared now to answer the interrogatory referred to on page 4 of the deposition in which on yesterday you informed the notary that you would examine the records and undertake to answer on the reconvening of the hearing today?

By Mr. Bakeney and Mr. Merritt: Objected to as incom-

petent, irrelevant and immaterial; and we object to any evidence as to any tract of land excepting the tract of land in controversy.

Court: Overruled. Exceptions.

A. I am. Will state that I examined the records closely and so far as I was able to ascertain all tracts in those five counties not advertised in the 1916 sale had been sold prior to that date in Section 33.

Q. And at that time did your examination of the records disclose at what time such lands had been sold prior to the advertisement referred to?

A. In the years 1910 and 1911.

Q. I will ask you a further question, Mr. Stine. If the few unsold sections 33 in the counties referred to being Jefferson, Stephens, Grady, Caddo and Comanche Counties, were advertised for sale in 1916?

By Mr. Blakeney and Mr. Merritt: Objected to as incompetent, irrelevant and immaterial, and especially object to any inquiry referring to any other land in controversy.

Court: Overruled. Plaintiff excepts.

A. Would state that the lands advertised for 1916 are shown in the pamphlet published in connection with that sale, being pamphlet for the Fifteenth Sales District.

Q. I will ask you to examine the 1916 pamphlet for the Fifteenth Sales District and state whether or not the Price land being the Northeast $\frac{1}{4}$ of Section 33, Township 1 South, Range 8 West was advertised for sale?

Mr. Blakeney: Of course, the pamphlet is the best evidence and I am not objecting to the question, but if the pamphlet is introduced I insist on it being withdrawn.

A. To the best of my knowledge, it was not advertised.

Q. The pamphlet you have before you shows that all the land that was advertised for the 1915 sale in the Fifteenth Sales District and it includes Stephens County?

A. Yes.

Q. And that pamphlet does not show this land was advertised for sale at that time?

A. The answer in reference to question regarding whether all lands not advertised in the pamphlet containing the lands advertised in 1916, with regard to Section 33, as not having been advertised in this pamphlet, and as to whether or not they had been sold prior to this time—prior to 1916; I

answered that question by stating that all lands not advertised in the 1916 sale had been sold prior to that time. I wish to state, however, that they were either sold or could not be sold because of the fact that the lessee would not agree to the appraisement as made by the Commissioners of the Land Office.

Q. Do you know whether in any of the unsold land, Mr. Stine, the lessee had taken an appeal from the appraisements on any particular tract of land—I mean appealed to the District Court?

A. I do not.

Q. Do your records show that any appeals from the appraisement to the District Court were taken by any of the lessees on the unsold lands above referred to?

A. Not that I know of.

Q. Now, for the purpose of identification—

By Mr. Blakeney: We hereby agree that the pamphlet had by Judge Sharp is a printed copy of the official advertisement of the sales of State and School Lands of Oklahoma of District No. 15 for the 1916 sale, and that he may himself keep the pamphlet and offer any part he wants to at the trial, subject, however, to the objections as to competency, relevancy and materiality.

Q. Mr. Stine, have you examined the records of your office with respect to the sales of the three quarter sections in Section 33, Township 1 South, Range 8 West, being the northwest quarter and the southeast quarter of such section; and you are now able to state to whom such lands were sold and at what price, giving the name of the purchaser.

Mr. Blakeney: Objected to as incompetent, irrelevant and immaterial and especially to any of the lands excepting the lands in controversy.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. Who purchased the Northwest $\frac{1}{4}$ of Section 33, Township 1, Range 8?

By Mr. Blakeney:

By Mr. Blakeney: Objected to as incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

Q. Do you know if the lessee purchased at that sale?

By Mr. Blakeney: Objected to as incompetent, irrelevant

and immaterial, and especially as to any land excepting the land in controversy.

Court: Overruled. Exceptions.

Q. Was the northwest quarter sold to the lessee?

A. It was.

Q. Was it sold at the appraised value?

M. Blakeney: Objected to as incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

A. It was.

Q. I will ask you if the southwest quarter of 33 was sold to the lessee?

By Mr. Blakeney: Objected to as incompetent, irrelevant and immaterial.

Court: Objections overruled. Exceptions.

A. It was.

Q. I will ask you if the southeast quarter of 33 was sold to the lessee at the appraised value?

By Mr. Blakeney: Objected to as incompetent, irrelevant and immaterial.

Court: Overruled. Exceptions.

A. It was.

Q. I will ask you if you have examined as to whether or not all of the four quarters sections in 34 immediately adjoining 33 on the east were sold at that 1911 sale?

A. I have.

Q. Were each of those quarter sections sold to the lessee?

By Mr. Blakeney: Objected to as incompetent, irrelevant and immaterial.

Court: Overruled. Exceptions.

A. They were.

Q. At the appraised value?

A. They were.

Q. I will ask you whether or not in your examination of last evening and this morning you ascertained whether or not the sections 34 last referred to was indemnity land?

Mr. Blakeney: It is agreed that Section 34 is indemnity land; subject to the objection of competency, materiality and relevancy.

Cross examination by Mr. Blakeney:

Q. Mr. Stine, how long have you been with the School Land Department?

A. Little over two years.

Q. You have no personal knowledge of the conditions existing in 1915 and 1916?

A. No.

Q. Your testimony as to what lands were sold prior to that time or advertised for sale at that time is merely a statement of what you find from the records of the office?

A. Yes, sir.

Q. Have you a copy of the rules of the office in concrete form, pamphlet form—rules I mean adopted by the Commissioners as authorized by the Statutes?

A. Have a pamphlet containing most of the rules, at least.

Q. Have you more than one copy of it?

A. Yes, sir.

Q. Copy you can furnish us and let us examine it and see what portions of it we would want to introduce in evidence?

A. Yes, sir.

Q. I will ask you to state what was the practice of the Commissioners with reference to the sale of land or the withdrawing of land from sale where the lessee had refused to agree to the appraisement, during the time you have been Chief Clerk as explained in your direct examination?

Mr. Sharp: Objected to because the same is not within the issues of this case, and incompetent, irrelevant and immaterial.

Court: Overruled. Defendants except.

A. I will state that during that time no land has been advertised for sale unless the lessee would agree to the appraisement as made by the Commissioners of the Land Office as to the value of the land and the improvements.

Q. What appraisement do you refer to there as being the one that was adopted for the sale of the land—I mean, what year?

A. During the year of 1919-20. I am trying to tell you now during my term here in the office that no sale has been ordered unless the lessee agreed to the appraisement of the land and improvements.

Q. Has there been any general appraisement during the time you have been in the office.

A. No.

Q. You have then adopted all the appraisements made,

or you made a new appraisalment on the particular piece of land you intended to sell since you have been in the office?

A. Made no new appraisalment.

Q. There has been no general appraisalment for sale purposes?

A. No, there has been some appraisalment for the purpose of fixing the rentals on lands not sold.

Q. Now during the period you have been in the office, lands have only been offered for sale upon the application of the lessee.

Mr. Boys and Mr. Sharp: Objected to as incompetent, irrelevant and immaterial.

Court: Overruled. Defendants except.

A. Yes.

Q. When a lessee filed an application for the sale, you had an appraisalment made and if it was agreed to by the lessee, then the land was offered for sale?

A. Yes, sir.

Q. Now, you know the defendant, Mr. Price?

A. I have met him.

Q. Have you ever discussed with him the matter of selling this land?

A. Yes, sir.

Q. When, and why did you have the discussion?

A. It was in the spring of 1920. He came to the Land Office to discuss the general subject of his land and I was unable to determine exactly what he wanted to talk about except just state what he said.

Cross examination by Mr. Merritt:

Q. Mr. Stine, have you examined the records to ascertain whether Mr. Price, the defendant, ever filed a petition asking to have the Northeast $\frac{1}{4}$ of Section 33, Township 1 South, Range 8 West, sold?

A. Yes, sir.

Q. What do the records show?

Mr. Boys: We object to the question as immaterial, for the reason the rights of the parties are fixed by the statutes as to the sale of the land and the protest to be filed.

Court: Overruled. Defendants except.

A. Never been able to find any such requisition or application.

Q. If a petition or application had been filed, would the records show it?

A. They would.

Mr. Boys: It is agreed that such parts of this witness' cross examination as is not strictly cross examination is submitted for and on behalf of the plaintiff and intervenor, and as their witness.

Re-direct examination by Mr. Boys:

Q. The records in the Price file are not very complete, are they, Mr. Stine?

A. I can't say they are.

Q. As a matter of fact, such correspondence as has been had between Mr. Price and the Board, if any, and all circular letters that were sent out to Mr. Price, none of these appear in the file?

A. Yes, sir, they do.

Q. How many?

A. I can't say how many.

Q. Will you produce those that appear in the file?

A. Mr. Merritt has them.

Q. About how many are there in there?

A. I do not know.

Q. Has Mr. Merritt all the letters that appear in the file that in any way affect the matter in controversy?

A. He has what I have been able to find.

Q. If Mr. Merritt produces those at the trial of the case, that is all that is in the office that you can find?

A. Yes, sir.

Q. As a matter of fact, the records do show there was such an appraisalment for sale purposes, and Mr. Price did accept that appraisalment, did he not?

A. I don't remember without looking it up.

Q. When you testify that no sale has been made since you were in the office excepting where the lessee filed an application for sale, that only applies to the two years you have been in office.

A. Yes, sir.

Q. Is it a fact that there have been no public lands in the State of Oklahoma sold during the two years you have been in office excepting upon petition of the lessee?

A. That applies to everything excepting town lots?

Q. You have not even sold any in 13, 16, or 36 during the

time you have been in office except upon petition of the lessee?

A. No, sir.

Q. You do not mean to say that was the practice before that time because you have no knowledge prior to that time?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and for the further reason that sales were only made in accordance with the provisions of the Statute, and not by any custom or practice of the Department.

Court: Overruled. Exceptions.

A. No, I have no personal knowledge prior to that time.

Q. Now, do you find in the files and records of your office petitions of the lessee for the sale of all the lands that were sold at the sales held in 1910-1911?

Mr. Blakeney: It is admitted by us that they did not require an application on part of lessee for any sale at the general sales, but as he stated there has been no general sale since he has been in office.

Mr. Merritt: We will admit that at the general sales held, no petition of the lessee for sale was required.

Q. Now, the sales held for 1910-1911 were general sales, were they not?

A. Yes, sir.

Q. And the sales held in 1915 and 1916 were general sales, were they not?

A. They were.

Q. Now, Mr. Stine, during the year 1920, the Commissioners did have the land in controversy appraised, did they not?

A. Yes, sir.

Q. That appraisement is on file in this office, is it not?

A. Yes, sir.

Q. That appraisement shows the improvements on the Price Quarter, does it not, at \$6,000?

A. It runs in my mind that is what it is.

Q. What does that appraisement show the land to be appraised at?

Mr. Merritt and Mr. Blakeney: Objected to as incompetent, irrelevant and immaterial, and for the further reason that under the law the appraisers making the appraisement for rental purposes were not required to appraise the improvements, and that the values placed upon the improvements were simply for information in the land office.

Court: Overruled. Exceptions.

A. \$3,200.00.

Mr. Boys: It is agreed that the appraisalment referred to in these depositions refer to the 1915 appraisalment.

Mr. Blakeney: Plaintiff rests.

Mr. Boys: Call Mrs. Ora Price.

MRS. ORA PRICE, being called as a witness for the defendants, and after being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. Boys:

Q. You may state your name?

A. Ora Price.

Q. You are the wife of W. T. Price?

A. Yes, sir.

Q. When did you move on the land involved in this controversy?

A. December 2, 1908.

Q. Where have you lived then since that time?

A. Lived there continuously.

Q. Do you claim that as your home, Mrs. Price?

Mr. Blakeney: We object to that as incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. Have you ever, at any time, signed any instrument in any manner to any person, company, corporation or association in the State of Oklahoma, waiving your claim to that land, whatever that may be?

Mr. Blakeney: We object for the reasons it is incompetent, irrelevant and immaterial; records do not show that she has any claim and in fact she has none.

Q. You do claim that as your homestead, do you not?

Mr. Blakeney: Objected to as irrelevant, incompetent and immaterial.

Court: Overruled. Exceptions.

A. Yes, sir.

Q. And have during all this time?

Mr. Blakeney: Objected to as irrelevant, incompetent and immaterial.

Court: Overruled. Exceptions.

A. Yes, sir.

Q. And have during all this time?

Mr. Blakeney: Objected to as irrelevant, incompetent and immaterial.

Court: Overruled. Exceptions.

A. Yes, sir.

Q. Mr. Price, does not write does he, Mrs. Price?

A. No, sir; he has bad eyesight.

Q. You, or some of the other members of the family do what writing and reading is necessary?

A. Yes, sir.

Q. Mrs. Price, do you know of a letter that was written to the Board of Commissioners of the Land Office of the State of Oklahoma, in February, 1910, or thereabouts, which was written to Mr. Cassidy, Secretary of the Commissioners of the Land Office?

A. I know we written him along there.

Q. I now hand you a letter dated February 19th, 1910, which purports to be signed by W. T. Price and will ask you whether or not that was a letter that was sent by your husband at that time to Mr. Cassidy?

A. Yes, sir; I am not positive I wrote that letter, but I know very well that it went from our home and with our knowledge.

Q. Perhaps one of the boys wrote it?

A. Yes, sir.

Mr. Blakeney:

O. If you wrote it you wrote it for Mr. Price, or whoever wrote it did?

A. Yes, sir; and by his authority and with his knowledge.

Mr. Boys: It is stipulated and agreed that the date of this letter, Ed O. Cassidy, was secretary of the Commissioners of the Land Office of the State of Oklahoma.

Mr. Boys: We now offer the letter in evidence and asks that the same be marked Defendants' Exhibit "O."

Mr. Blakeney: Plaintiff object as irrelevant, incompetent and immaterial.

Court: Overruled. Plaintiff excepts.

Said Exhibit "O" is received in evidence and is as follows, to wit:

Comanche, Okla., Feb. 19, 1910.

Mr. Ed Cassidy.

Dear Sir:

I wrote you before Christmas about the re-adjustment of NE of Sec. 33 of Stephens County and you said you would notify me the first of the year when the adjusters come to Comanche Co. But they have already been there and have heard nothing. I want to get this place re-appraised and would like for it to be straightened out before the rest of the land sells, as I want it to go with the rest. Was not pleased with the first appraisement and if something is not done before time for it to sell there will be a balk in the sale. What must I do about this re-adjustment I wanted it done and you did not notify me when they met in Comanche County. Let me hear from you at once.

Respectfully,

W. T. PRICE.

P. S. If this is not going to sell this year I want to make a trade with you to cut some wood off the pasture land, but if it does sell I will not do it.

Endorsed on back of letter

NE 33 1 S 8 Stephens Co. Adj. 68

Received

Feb. 21, 1910

Secretary.

And the same is included in the offer of the letter showing the above stamped on the back of the letter.

Q. Have you written other letters up there besides this one to get this matter adjusted so there could be a sale of this land?

Mr. Blakeney: Objected to as incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir; every time we thought it needed it, we did.

Q. Did you receive a letter from Mr. Cassidy in reply to that letter?

A. I think we did; I think they always answered our letters.

Q. Have you any of those letters?

A. No, sir.

Q. I hand you now what purports to be a carbon copy of

a letter, handed to me by Mr. Merritt, and ask you to state if, according to your best knowledge and best memory, and recollection if that is a copy of the letter you received?

Mr. Blakeney: We will admit that is a copy of the letter and object to it as incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

Feb. 21, 1910.

Re Re-adjustment.

Mr. W. T. Price.

Comanche, Okla. No. 4

Dear Sir:

Replying to yours of the 19th inst., our record show you have on file an application for re-adjustment and correction of the 1908 appraisalment on the NE $\frac{1}{4}$ of Section 33 1 S 8. This application will be heard at the next meeting of the adjusters Board in Stephens County; it is not possible to have the hearing in time for the land to be placed on sale in the first sale of lands in that county; it will probably be next winter before this land will be sold.

Yours very truly,

ED. O. CASSIDY,

Secretary.

Mr. Blakeney: No cross examination.

MR. W. T. PRICE, being recalled as a witness for the defendants, testified as follows:

Direct examination by Mr. Boys:

Q. Mr. Price, you are the same Mr. Price that was on the stand yesterday?

A. Yes, sir.

Q. You remember the sale of the public lands of the State of Oklahoma, that was held in Stephens County, January 18, 19, 1911?

A. Yes, sir.

Q. Did you attend that sale?

A. Yes, sir.

Q. Did they offer your land for sale that day?

A. No, sir.

Q. Did they offer other lands in Section Thirty-three (33) and indemnity land for sale on that day?

Mr. Blakeney: We object; incompetent, irrelevant and

immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir.

Q. Did you make any demand upon the officers in charge of the sale that day with relative to your land?

Mr. Blakeney: Objected to as incompetent, irrelevant and immaterial.

Court: Overruled. Plaintiff excepts.

A. Yes, sir; I did.

Q. State what you did and what they said?

Mr. Blakeney: Objected to for the reason it is incompetent.

Court: Overruled. Plaintiff excepts.

A. I told them, when they got through that section, I said put my land up and let it go with the rest of the land, and they no, can't do that, it hasn't been advertised; said it would be right away soon; that there would be another sale right soon, but couldn't sell it then.

Mr. Blakeney: We now move to strike out the last part of the answer, same being hearsay and not made by any officer authorized by the State to make such a statement.

Court: Overruled. Plaintiff excepts.

Q. That conversation was had and made by the officers there in charge of the sale?

A. Yes, sir.

Cross examination by Mr. Blakeney:

Q. You are in possession of this land and holding it under a lease of the State?

A. Why, I am on it; I don't know whether I am going to hold it or not, but I am trying to hold it as hard as anybody.

Q. You are in possession under a lease from the State?

Yes, sir.

Q. Paying rentals to the State?

A. Have been.

Q. As a matter of fact you have only failed to pay the rentals that have matured during the pendency of this law suit?

A. I never did fall down on a just debt; if it is just I will pay.

Q. You have paid it year after year to the State and have paid it on the land you have been occupying?

A. Yes, sir.

Q. You never bought the land?

A. No, sir.

Q. Been no sale of it to you or anybody else?

A. No, sir.

Defendants rest.

Plaintiff rests.

That thereafter, to wit, on the 18th day of April, 1921, said cause coming on for further hearing and the parties appearing as shown at the trial, and the Court being fully advised in the premises, enters judgment for the defendants, to which action the Court the Plaintiff and the Intervenor each at the time excepted and still except, and said Journal Entry was ordered filed and recorded and is in words and figures as following to wit:

In the District Court in and for said County and State.

STATE OF OKLAHOMA,

Stephens County.

MAGNOLIA PETROLEUM COMPANY, a joint stock association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees, Plaintiffs,

VS.

WILLIAM T. PRICE and ORA PRICE, his wife, Defendants,
STATE OF OKLAHOMA, *ex rel.* Commissioners of the Land Office
of the State of Oklahoma and *ex rel.* S. P. Freeing, At-
torney General of the State of Oklahoma, Interveners.

No-----

Decree.

This cause coming on to be heard on this the 3rd day of March, 1921, plaintiff appearing by its attorneys, Blakeney & Maxey, and the defendants, William T. Price and Ora Price, appearing in person and by their attorneys, Stevens & Richardson; Stuart, Sharp & Cruce, and Blake & Boys; thereupon, it appearing that the State of Oklahoma, *ex rel.* Commissioners of the Land Office and the Attorney General of the State of Oklahoma, heretofore and on the 3rd day of December, 1920, filed in this cause their petition of intervention, and that notice of the filing of such petition has heretofore, on December 13, 1920, been served upon attorneys for defendants.

And the matter of permitting such petition of intervention to be filed coming on for hearing, and there being no objection, either on the part of the plaintiff or of defendants, to the filing of such petition of intervention and of the State of Oklahoma thereby becoming a party to this action, it is by the Court ordered that the State of Oklahoma be, and the same is hereby, permitted to intervene in this cause as of December 3, 1920. Thereupon, the plaintiff is granted permission to reply instant to the defendants' answer and cross-petition and the defendants are granted permission to file their answer to the petition of intervention of the State and the State granted permission to file its reply to the answer and cross-petition of the defendants. Whereupon, all parties announced ready for trial and waived a jury in said action, and agreed that the cause should be tried before the Court. The cause was then heard upon the amended petition, answer and cross-petition, petition of intervention, reply and answer to petition of intervention, and replies of the plaintiff and intervenor, exhibits, stipulations of parties, admissions, and upon the evidence and argument of counsel, and the time for adjournment having arrived, the further hearing of said cause was continued until March 4, 1921, on which date, all parties appearing as on the previous day, the trial was proceeded with and the taking of the evidence and the argument of counsel concluded. Thereupon, by agreement of the parties, the Court continued said cause until a later day, namely, April 18, 1921, for final decision and a decree. Thereafter, and on the 18th day of April, 1921, all parties appearing as on the previous days, and the Court being fully advised in the premises, and upon due consideration thereof, finds and decrees as follows:

(1) That the temporary injunction heretofore issued and continued in said cause was wrongfully issued and continued, and that the same should be dissolved and held for naught. To which plaintiff and intervenor each except.

(2) That the oil and gas lease held by plaintiff, Magnolia Petroleum Company, executed by the Commissioners of the Land Office on the 4th day of January, 1919, and which is referred to and marked "Exhibit A" to plaintiff's amended Petition, is null and void, and of no force and effect as against the defendants herein, William T. Price and Ora Price. To which plaintiff and intervenor each except.

(3) That the lands in controversy have been leased by

the proper authorities of the Territory of Oklahoma since the 8th day of January, 1902, with the preference right to re-lease, all being done under and by virtue of the Acts of Congress and the Rules and Regulations then, and until statehood, in force, and have at all times since statehood been leased by the proper state authorities to the present time, with the preference right to re-lease and preference right to purchase as provided by the Enabling Act and the valid laws of the State of Oklahoma authorizing the sale of public lands. To which plaintiff and intervener each except.

(4) That the defendant, William T. Price, purchased the lease and improvements on the lands involved, and the preference right to re-lease and the preference right to purchase the lands involved, during the fall of 1908, and has continuously occupied and held said lands under such preference right lease as provided by the Enabling Act and laws of the State since said date, and that the Commissioners of the Land Office and the State of Oklahoma, have recognized his preference right to re-lease and his preference right to purchase, as provided by law at all times since the time of the filing and acceptance of the relinquishment from his predecessor in title, L. B. DeArman, on or about the 15th day of October, 1909, to and including the present time. To which plaintiff and intervener each except.

(5) That since the said purchase by said Price, he has continuously occupied said land with his family as his homestead and has at all times asserted his claim of title in and to said land. To which plaintiff and intervener each except.

(6) That on or about the 12th day of January, 1909 the said lands were appraised under directions of the Commissioners of the Land Office for sale purposes at Three Thousand Dollars (\$3,000.00), and that no appeal was taken from said appraisement by the said William T. Price, and the said appraisement became thereby finally fixed and adjudicated as the true appraised value of said land for sale purposes, and that the said sum of Three Thousand Dollars (\$3,000.00) was the fair and reasonable value of the land, exclusive of improvements, at the time that said lands should have been sold by the Commissioners as provided by the laws of the State of Oklahoma. To which plaintiff and intervener each except.

(7) That the Commissioners of the Land Office have wrongfully failed and neglected to sell said land as required

of them by the laws of the State of Oklahoma. To which the plaintiff and intervener each except.

(8) That the said defendant, William T. Price, has at all times been ready, willing and able to comply with any and all provisions of law relative to the purchase of said lands and did demand of the Commissioners of the Land Office and of their agents and representatives entrusted with the sale of said lands, that the same be sold, which was refused.

(9) That the defendant, Price, was a qualified person under the law to hold a lease to said lands and to exercise his preference right to re-lease said lands and his preference right to purchase the same, and had acquired and now has a vested right in and to said land. To which the plaintiff and intervener each except.

(10) That the defendant, William T. Price, is the equitable owner of the title to said premises and is entitled to have his record title to the said lands made perfect upon the payment of the purchase price of Three Thousand (\$3,000.00) Dollars as provided by law. To which the plaintiff and intervener each except.

(11) That the land in controversy was not valuable for minerals, oil or gas, or known to contain oil or gas, prior to discovery thereof in the year 1920, and after the commencement of this action. To which the plaintiff and intervener each except.

(12) That the defendants, William T. Price and Ora Price, are entitled to an injunction against the plaintiff, the Magnolia Petroleum Company, and against the State of Oklahoma, and the Commissioners of the Land Office of the State of Oklahoma, enjoining them and their successors, and their agents, servants and employes, and their successors in office, from in any way interfering with the possession of the defendants in and to said lands, or interfering in any way with the rights and title of the said defendants. To which the plaintiffs and intervener each except.

(13) And the Court finds not only the foregoing facts and issues of fact in favor of the defendants herein, but finds all other facts in this cause and issues of law and fact in favor of defendants. To which the plaintiff and intervener each except.

It is therefore ordered, adjudged and decreed as follows:

(1) That the plaintiff, Magnolia Petroleum Company; John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumley, and W. C. Proctor, as trustees, take nothing by their suit and that the temporary injunction heretofore granted, and afterwards continued against defendants, William T. Price and Ora Price, be dissolved, vacated, set aside and held for naught. That the plaintiff having gone upon the lands hereinafter described in paragraph 2 of this decree, under the authority of the temporary injunction heretofore wrongfully obtained and improvidently granted and continued, the said plaintiff is hereby ordered and directed to quit and vacate and abandon that part and parts of the premises occupied by it, and if said plaintiff does not quit and vacate said premises, or any part thereof, within thirty (30) days from the date of this decree, the Court Clerk is hereby directed upon the expiration of said thirty (30) days and upon the filing of an affidavit by the defendant showing that said plaintiff has not quit and vacated said premises, as required herein, to issue a writ directed to the sheriff of Stephens County, Oklahoma, directing the said Sheriff to remove said plaintiff and all its trustees, officers, agents and employees from any and all parts of said land. To which the plaintiffs and intervener each except.

(2) That the plaintiff, Magnolia Petroleum Company; John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumley and W. C. Proctor, as trustees, its or their successor or successors, agents, servants and employees, be, and they are hereby enjoined from trespassing or going upon, or exercising any claim of possession, right or authority over, or in any way interfering with or obstructing defendants in the exercise of their respective rights, title and possession in and to the Northeast Quarter (NE $\frac{1}{4}$) of Section Thirty-three (33), Township One (1) South, Range Eight (8) West of the Indian Meridian, in Stephens County, Oklahoma. To which the plaintiff and intervener each except.

(3) That the Commissioners of the Land Office of the State of Oklahoma, and their successors in office, and their agents, servants and employees, together with such other officers of the State having, or claiming to have, authority in the premises, and each of them, be, and they are hereby, enjoined from exercising any alleged right or authority over, or in any way interfering with or obstructing defendants in the exercise of

their rights, title and possession in and to the tract of land named and described in the foregoing paragraph. To which plaintiffs and intervener each except.

(4) That the oil and gas lease executed by the Commissioners of the Land Office of the State of Oklahoma to the plaintiff, the Magnolia Petroleum Company, on the 4th day of January, 1919, a copy of which is attached to plaintiff's amended petition and marked "Exhibit A", is hereby declared to be void as to the defendants, William T. Price and Ora Price, and the same is hereby adjudged to be set aside and held for naught, and the plaintiff, and its trustees, officers and agents, be, and they are hereby ordered and directed to execute a proper release of said oil and gas lease within thirty days from the date of this decree that will effectually release such oil and gas lease from being a cloud on the title to said lands. And if the said plaintiff shall fail to execute such release within said thirty days, it is further ordered, adjudged and decreed that this decree shall be a full and complete release of said oil and gas lease so held by the plaintiff herein, and that a certified copy of this decree may be filed with the County Clerk of Stephens County, Oklahoma, and with the Secretary of the Commissioners of the Land Office of the State of Oklahoma by the defendants herein. To which the plaintiff and intervener each except.

(5) That the defendants, William T. Price and his wife, Ora Price, have, and have had at all times since their purchase, a vested right in and to said lands and have done all things required of them under the law, and are the owners and holders of the equitable title to said lands. That the sum of three thousand dollars (\$3,000.00) is, and was, the fair and reasonable value of said lands, exclusive of the improvements owned by the said defendants, at the time said lands should have been sold by the Commissioners of the Land Office, and the State of Oklahoma by and through the Commissioners of the Land Office, is hereby ordered and directed to make and execute to the defendant, William T. Price, a patent in fee in the usual form, upon the payment by the said William T. Price of the sum of three thousand dollars (\$3,000.00), together with interest thereon at the rate of five per cent (5%) from January 19, 1911, less the amounts paid as rentals since January 19, 1911, together with interest on said amounts paid as rental at the rate of five per cent (5%) from the date of

each respective payment. To which the plaintiff and intervener each except.

(6) That the plaintiff, the Magnolia Petroleum Company, be and it is hereby directed to account for all oils, gas and other minerals taken from said lands, and for all items of loss and damage that it may have occasioned to said lands by reason of going upon the same under and by virtue of its oil and gas lease and the temporary injunction heretofore issued in this cause; and the Court reserves jurisdiction of this cause for the further taking of testimony and hearing on the matters and things set out in this paragraph, on both questions of law and fact, and sets the hearing of the same for the 6th day of May, 1921. To which the plaintiff and intervener except.

(7) That the action of the Commissioners of the Land Office in leasing said lands to plaintiff for oil and gas purposes, violated the rights guaranteed to the defendants by the Constitution of the State, the Constitution of the United States and the laws of the United States. To which the plaintiff and intervener except.

(8) That a Receiver be appointed to take charge of the mineral development in and of said lands and the Honorable Ed. J. Kelly is hereby appointed such receiver until the further order of this Court, upon the giving of a bond in the sum of Fifty Thousand Dollars (\$50,000) to be approved by this Court or the Judge thereof, and the taking and filing of the usual oath of office; and upon the execution and approval of said bond and taking of said oath of office, he shall proceed to take charge of said lands, and of all and any of the oil and gas wells, pipes, tanks, pumps, buildings, machinery and appliances of all and every kind used, or connected with the oil and gas and mineral development of said lands. Also to take charge of all oil, gas and mineral production thereon, the storage, handling, sale and disposition thereof, and keep an accurate account of all oil and gas produced thereon, and the expense occasioned in the production thereof, and collect the proceeds from all oil and gas produced and pay the necessary and proper expenses thereon, and to employ and discharge or retain such help and employees as may be necessary to properly operate such mineral development. That upon taking possession of said property, said receiver shall

make and cause to be made a full and complete survey and inventory of the said property and make a full and complete report thereof to the Court, and shall mail a true copy of said report to the counsel for the respective parties in this cause. The said receiver is further directed not to take charge of the agricultural operations of the defendant William T. Price. That the duties herein required of the receiver may be changed at any time by the Court upon proper notice to the parties in the action, and such further and other duties as may be required and necessary may be from time to time given him by the Court; but that said Receiver shall have full authority to do and perform the things required of him pending the further orders of this Court. To which the plaintiff and intervener except.

(9) That the defendants, William T. Price and Ora Price, have and recover of the plaintiff and of the intervener, the costs of this action; to which judgment and findings of the Court and each and every paragraph thereof, the plaintiff and the intervener, each for itself, excepts and exceptions are allowed.

Thereupon, the plaintiffs and the intervener in open court gave notice of their desire and intention to appeal the said cause to the Supreme Court of said State, and the Court caused said notice to be entered in the trial docket and in the minutes and journals of the said Court.

Thereupon, the plaintiffs and intervener each filed their motions for a new trial, and the same coming on for hearing, and the Court being fully advised in the premises, overruled each of the said motions for a new trial, and the plaintiffs excepted to the action of the Court in overruling their motion for a new trial, and the intervener excepted to the action of the Court in overruling its motion for a new trial.

Thereupon, the said plaintiffs and the said intervener each gave notice in open court of their intention and desire to appeal said cause to the Supreme Court, and the Court caused such notice to be entered in the trial docket and in the minutes and journals of the said Court.

That thereafter, to wit, on the 18th day of April, 1921, the plaintiff, the Magnolia Petroleum Company, filed in said cause its motion for a new trial; which motion for a new trial is in words and figures as follows, to wit:

In the District Court in and for said County and State.
STATE OF OKLAHOMA,
Stephens County, ss:

No. 2885.

MAGNOLIA PETROLEUM COMPANY, a joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. F.
Plumly and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE, and ORA PRICE, his wife, Defendants.

and

STATE OF OKLAHOMA, *ex rel* Commissioners of the Land Office,
Intervener.

Motion for New Trial.

Comes now the plaintiff in the above entitled cause and moves the court to set aside the findings and judgment rendered in the said action on the 18th day of April, 1921, upon the grounds and for the following reasons, to wit:

First, That the decision and judgment of the Court is contrary to the law.

Second, That the decision and judgment of the Court is unsupported by the evidence.

Third, That the Court erred in refusing to issue a temporary injunction in the said action, and in not making the same permanent on the final hearing thereof.

Fourth, The Court erred in vacating the temporary restraining order issued herein.

Fifth, For errors of law occurring at the trial and excepted to by both the plaintiff and the intervener at the time of the decision or decisions.

Sixth, That the Court erred in not sustaining the motion to strike certain matters from the answer of the defendants.

Seventh, That the Court erred in overruling the demurrer interposed by the plaintiff to the defendant's answer.

Eighth, That the Court erred in not entering judgment in favor of the plaintiffs and against the defendants perpetually and permanently enjoining the defendants and each of them from in any way interfering with the plaintiff in the exploring

for and developing the oil and gas in and under the premises in controversy.

BLAKENEY & MAXEY,
HUBERT AMBRISTER,
WOMACK & BROWN,

Attys. for Plaintiff.

That thereafter, to wit, on the 18th day of April, 1921, the State of Oklahoma, Intervener herein, filed in said cause its Motion for a New Trial; which Motion for a New Trial so filed, being in words and figures as follows, to wit:

In the District Court in and for said County and State.

STATE OF OKLAHOMA,
Stephens County.

No. 2885.

MAGNOLIA PETROLEUM COMPANY, a joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE, and ORA PRICE, his wife, Defendants.

and

STATE OF OKLAHOMA, *ex rel* Commissioners of the Land Office,
Intervener.

Motion for New Trial.

Comes now the State of Oklahoma, Intervener in the above entitled action, and moves the Court to set aside the findings and judgment rendered in said action on the 18th day of April, 1921, upon the grounds and for the reasons following, to wit:

First, That the decision and judgment of the Court is contrary to the law.

Second, That the decision and judgment of the Court is unsupported by the evidence.

Third, That the Court erred in refusing to issue a temporary injunction in the said action, and in not making the same permanent on the final hearing hereof.

Fourth, The Court erred in vacating the temporary restraining order issued herein.

Fifth, For errors of law occurring at the trial and excepted to by both plaintiff and the intervener at the time of the decision or decisions.

Sixth, That the Court erred in not sustaining the motion to strike certain matters from the answer of the defendants.

Seventh, The Court erred in overruling the demurrer interposed by the plaintiff to the defendants' answer.

Eighth, That the Court erred in not entering judgment in favor of the plaintiff and against the defendant perpetually and permanently enjoining the defendants and each of them from in any way interfering with the plaintiff in the exploring for and developing the oil and gas in and under the premises in controversy.

GEO. E. MERRITT,
Attorney for Intervener.

Endorsed: No. 2885. Filed in District Court Apr. 18, 1921.
G. A. Witt, Court Clerk.

And thereafter, to wit, on this 18th day of April, 1921, said cause coming on further for hearing on motions for new trial filed by the plaintiff and intervener, and the Court being duly advised

It is ordered that the motion for new trial filed by the plaintiff, be, and the same is hereby overruled, and the plaintiff excepts and gives notice in open court on said date of their intentions to appeal to the Supreme Court, and the Clerk of the Court entered such notice on the Trial Docket.

and it is further ordered that the motion for a new trial of the intervener, the State of Oklahoma, *ex rel.* Commissioners of the Land Office, be, and the same is hereby overruled, and the Intervener excepts and gives notice on said date of its intention to appeal to the Supreme Court, and the Clerk of said Court entered such notice on the Trial Docket.

The above and foregoing case-made sets out fully and correctly all the pleadings filed in said cause; all motions filed or made, and all rulings thereon; all exceptions taken by the defendants and plaintiff and intervener to such rulings and orders; all the evidence offered, introduced or received upon the trial; all admissions and agreements; the judgment of the Court thereon and the exceptions of the plaintiff and the intervener thereto; that the same is a full, true, complete and correct case-made and transcript of all the pleadings, motions

and all the evidence, findings, orders, judgments and proceedings had in said cause.

In the District Court of Stephens County, Oklahoma.

No. -----.

MAGNOLIA PETROLEUM COMPANY, a joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE, and ORA PRICE, his wife, Defendants.

and

STATE OF OKLAHOMA, Intervener.

To Blake & Boys, Stevens & Richardson, Stuart, Sharp &
Cruce, Attorneys of Record for the Defendants.

You, and each of you will take notice that the above and foregoing record in the above entitled and foregoing cause is tendered to you as a full, true, complete and correct case-made in said cause this the 20th day of April, 1921.

BLAKENEY & MAXEY,
Attorneys for Plaintiff.

GEO. E. MERRITT,
Attorney for Intervener, The State of Oklahoma.

We hereby acknowledge due, legal and timely service of the above and foregoing case-made on us on this the 20th day of April, 1921.

STUART, SHARP & CRUCE,
BLAKE & BOYS,
STEVENS & RICHARDSON,
Attorneys of Record for Defendants.

In the District Court of Stephens County, State of Oklahoma.

No. -----.

MAGNOLIA PETROLEUM COMPANY, a joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE and his wife, ORA PRICE, Defendants.

and

STATE OF OKLAHOMA, Intervener.

I, Edward Henderson, the duly qualified and acting Court Reporter for the above entitled court, hereby certify that the foregoing record contains a full, true, complete and correct record, transcript and copy of all the evidence, both written and oral, offered in the trial of said cause; all the statements of the Court and of counsel; all the motions, demurrers, objections and exceptions and all rulings of the Court and the exceptions thereto, and all other proceedings had in the said trial of said case and the same are true and correct and I do so certify.

Given under my hand as such official Court Reporter on this the 18th day of April, 1921.

EDWARD HENDERSON,

District Court Reporter.

In the District Court of Stephens County, State of Oklahoma.

No. 2885.

MAGNOLIA PETROLEUM COMPANY, a joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE, and ORA PRICE, his wife, Defendants.

and

STATE OF OKLAHOMA, Intervener.

I, the undersigned, Judge of the above entitled court at the time of the trial of the above entitled cause, as said Judge who tried said cause, hereby certify that the above and foregoing case-made in said cause was presented to me as a full,

true, complete and correct case-made in said cause and the suggestion of amendments to said case-made in said cause being waived by counsel for plaintiff, intervener and defendants and notice of the time and place of presentation of same me for signing and settling having also been waived by all interested parties.

Now, therefore, I, as said Judge of said above entitled Court, who tried said cause, hereby settle and sign the above and foregoing case-made as a full, true, complete and correct case-made in said cause and direct that it be attested as such by the clerk of the above court and filed by him therein to be thereafter withdrawn and delivered to plaintiff for filing in the Supreme Court of the State of Oklahoma.

Witness my hand this the 28th day of April, 1921.

CHAM JONES,
District Judge.

Attest:

G. A. WITT,
Court Clerk of Stephens County, Oklahoma.

By Jessie F. Barnes, Deputy Court Clerk of Stephens County.

In the District Court of Stephens County, State of Oklahoma.

No. 2885.

MAGNOLIA PETROLEUM COMPANY, a joint Stock Association,
John Sealy, E. R. Brown, R. Waverly Smith, E. E.
Plumly and W. C. Proctor, Trustees, Plaintiffs,

vs.

WILLIAM T. PRICE, and ORA PRICE, his wife, Defendants.
and

STATE OF OKLAHOMA, Intervener.

To Blake & Boys, Stevens & Richardson, Stuart, Sharp &
Cruce, Attorneys of Record for the Defendants:

You, and each of you, will take notice that the plaintiff and the intervenor in said action will, on the 28th day of April, 1921, at the hour of 11 o'clock A. M., present the above and foregoing case-made to the Honorable Cham Jones, the Judge presiding at the trial of said cause, in the District Court room in the Court House in the Town of Duncan, Stephens County,

Oklahoma, and ask that the same be settled, signed, certified and ordered filed, as by law provided.

Dated this 20th day of April, 1921.

B. B. BLAKENEY,
HUBERT AMBRISTER,
WOMACK & BROWN,
Attorneys for Plaintiff.
GEO. E. MERRITT,
Attorney for Intervener.

We hereby acknowledge service of the above and foregoing notice on us on this the 20th day of April, 1921.

STUART, SHARP & CRUCE,
Attorneys of Record for Defendants.

STATE OF OKLAHOMA,
County of Stephens, ss:

I, G. A. Witt, Court Clerk within and for the County of Stephens and State of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete transcript of record as fully as the same remain on file and of record in my office in case of Magnolia Petroleum Company vs. W. T. Price *et al.*

In testimony whereof, I hereto set my hand and affix the seal of said court, at my office in the City of Duncan, in the County of Stephens and State of Oklahoma, this 28th day of April, A. D. 1921.

G. A. WITT,
Court Clerk.

JESSIE T. BARNES,
Deputy.

[SEAL]

Thereafter, at the April, 1921, term of said Supreme Court, on the third day of May, 1921, the following proceeding was had in said cause, to wit:

No. 12,243.

MAGNOLIA PETROLEUM Co.

VS.

WM. T. PRICE ET AL.

And now on this day it is ordered by the court that the

above cause be advanced and set for oral argument on June 20, 1921.

Thereafter at the April, 1921, term of said Supreme Court, on the third day of May, 1921, the following proceedings was had in said cause, to wit:

No. 12,243.

MAGNOLIA PETROLEUM CO.

VS.

WM. T. PRICE ET AL.

The above cause coming on for hearing in open court upon the application of the plaintiffs for supersedeas of the judgment entered on April 18, 1921, by the District Court of Stephens County, and the court being fully advised in the premises, orders:

That the judgment be, and hereby is, superseded upon the execution by the plaintiff, the Magnolia Petroleum Company, of bond in the sum of Fifty Thousand Dollars (\$50,000.00) with sureties, to be approved by the clerk of said court and conditioned as may be agreed by the parties hereto, or ordered by the Chief Justice of said court, to be filed within 10 days from the date hereof.

It is further ordered that so much of the said judgment of the District Court of Stephens County appointing Ed. J. Kelly receiver and fixing his powers in said matter, is hereby modified as follows: That Ed J. Kelly be, and hereby is, continued receiver, and be required to make a bond in the sum of Ten Thousand Dollars (\$10,000.00), to be filed with and approved by the clerk of the District Court of Stephens County, and upon the giving of such bond and filing of his oath of office, shall be, and is hereby given authority to inspect and check all of the operations of the plaintiffs on said premises, and the running of all oil and gas produced on said premises; and that the said Magnolia Petroleum Company shall continue the operation of the three wells now completed on said premises, and continue the drilling to completion of the three wells now being drilled on said premises, and when the said wells are also completed, to operate the same; this order to be subject to the further order of the court. It is further ordered that whenever the Magnolia Petroleum Company desires to run any oil from the said lease, that they

shall give notice to the said Kelly, or his agent in charge of the matter, of their intention to run such oil, at least forty-eight (48) hours before the same is run, and that thereupon the said receiver shall measure the said tank so run and the amount of oils that may be run therefrom, or cause the same to be so measured; and shall keep an accurate account of the amount of oil so run from said premises, together with the market price thereof including bonus, if any.

It is further ordered that in case gas shall be discovered or produced in paying quantities from said premises, the court reserves that question for further orders.

It is further ordered that the receiver may at any time, or either party of the said cause, upon notice to the other parties, present an application for a change or modification of the duties of the said receiver.

O.K. B. B. Blakeney for plf.

J. F. Sharp and A. T. Boys, Attys. for dfts.

Thereafter, at the June, 1921, term of said Supreme Court, on the twentieth day of June, 1921, the following proceeding was had in said cause, to wit:

No. 12,243.

MAGNOLIA PETROLEUM CO.

VS.

WM. T. PRICE ET AL.

And now on this day the cause is argued orally and submitted and it is ordered by the court that leave be granted to file supplemental brief in said cause.

Thereafter, at the June, 1921, term of said Supreme Court, on the nineteenth day of June, 1921, the following proceeding was had in said cause, to wit:

No. 12,243.

MAGNOLIA PETROLEUM CO.

VS.

WM. T. PRICE ET AL.

And now on this day it is ordered by the court that leave be granted to drill off-set well as per application filed in the above cause.

Thereafter, on August thirtieth, 1921, the following proceeding was had in said cause, in said Supreme Court, to wit:

No. 12,243.

MAGNOLIA PETROLEUM Co.

VS.

WM. T. PRICE ET AL.

And now on this Aug. 30, 1921, it is ordered by the court that leave be and is hereby granted to drill off-set well as per application filed in the above cause.

Thereafter, at the June, 1921, term of said Supreme Court, on the twenty-seventh day of September, 1921, the following proceeding was had in said cause, to wit:

No. 12,243.

MAGNOLIA PETROLEUM Co.

VS.

WM. T. PRICE ET AL.

And now on this day it is ordered by the Court that plaintiff in error be permitted to drill off-set well No. 10 on the premises and at the point indicated on plat attached to and made a part of motion for leave to drill.

Thereafter, at the February, 1922, term of said Sureme Court, on the twenty-first day of March, 1922, the following proceeding was had in said cause, to wit:

No. 12,243.

MAGNOLIA PETROLEUM Co.

VS.

WM. T. PRICE ET AL.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the temporary injunction against W. T. Price and Ora Price, his wife, defendants in error, be, and the same is hereby made perpetual and the said defend-

ants in error are hereby perpetually enjoined from interfering with the operations of said oil and gas lease, and the State of Oklahoma is hereby decreed to be entitled to all royalties of oil and gas produced under said lease, and said defendants in error are hereby decreed to be entitled to such damages as they may have sustained to their agricultural lease by reason of the operation of said oil and gas lease. Opinion by Harrison, C. J. All the Justices concur.

Filed in Supreme Court of Oklahoma, March 21, 1922,

Wm. M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 12,243.

MAGNOLIA PETROLEUM COMPANY, a joint stock association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Piumly and W. C. Proctor, trustees; State of Oklahoma ex rel. Commissioners of the Land Office, S. P. Freeling, Attorney General of the State of Oklahoma, Plaintiffs in Error,

vs.

WILLIAM T. PRICE and ORA PRICE, Defendants in Error.

Syllabus.

1. The Act of Congress, March 3rd, 1891, 26 Stat. L. 1026, does not provide for a preference right to re-lease the public lands of the Territory, nor do any subsequent acts, pertaining to the subject prior to the passage of the Enabling Act, provide for the re-leasing of such lands, nor for a preference right to the original lessee.

2. The moving and expressly designated purpose set forth in the various acts of Congress, pertaining to the public lands which were reserved for the future State, was that sections 16 and 36 of each township should constitute a permanent school fund for the common schools; that section 13 in each township, in the portions of the state where sections 13 and 33 were reserved from settlement, was reserved for University and other school purposes; and section 33 reserved for public building purposes, and no other purpose is given by Congress for reserving said lands from settlement, except the designated purposes mentioned.

3. After the approval of the Act of March 3rd, 1891, *supra*, the Secretary of the Interior made a rule, of which the follow-

ing is the pertinent part: "In case a new lease is made at the end of the third year, the preference right shall be given the former lessee." Held, this did not grant to the lessee the right to lease in perpetuity, but merely granted a preference right to re-lease under conditions prescribed in case the Territory chose to re-lease such lands.

4. The grant of lands, to wit, Sections 16 and 36, for common school purposes; section 13 for the support of higher institutions of learning; and section 33 for the purpose of public building, and the acceptance of such lands by the State by express provision of the Constitution, constituted a complete contract and compact between the government of the United States and the State of Oklahoma, and supersedes all previous acts, rules and regulations in conflict therewith.

5. Said Act of Congress, known as the Enabling Act, did not impose upon the State the obligation to sell said lands, or any of them, but merely provided that if sold they should be sold in the manner provided for in the grant and acceptance by the Constitution.

6. The State could have, had it so elected, retained said lands, and all of them, as a permanent fund for the respective purposes for which they were granted, and never sold any of them at any time, and yet not violated any condition of the grant.

7. Neither was the State obliged to lease any of said lands beyond the conditions expressed in the Enabling Act and accepted under the Constitution.

8. Lessees, holding under leases granted prior to Statehood, have no rights under the lease, except those expressly provided for in the Enabling Act, the Constitution and the statutes of Oklahoma, and the terms of their lease contract.

9. Neither under the conditions of the Enabling Act, the provisions of the Constitution nor the terms of the lease contract involved here, is the agricultural lessee, defendant in error, W. T. Price, entitled to the oil and gas and other minerals in said land until same is conveyed to him by the State, nor has he power to force the State to convey same to him until the State elects to do so.

10. The oil and gas lease herein granted to the Magnolia Petroleum Company by the Commissioners of the Land Office, is not in conflict with the conditions of the grant, nor the acceptance thereof, nor with the statutes of Oklahoma, and is a valid lease.

11. The Defendant in Error, W. T. Price, is not authorized to interfere with the operation of said oil and gas lease, but is entitled to whatever damages he may sustain to the operation of his agricultural lease by reason of the operation of such oil and gas lease.

Error from the District Court of Stephens County. Hon. Cham Jones, Judge.

Reversed.

S. P. Freeling, Attorney General; C. W. King, Asst. Attorney General; Geo. E. Merritt, Attorney for Commissioners; W. H. Francis, B. B. Blakeney and Hubert Anabrister, Attorneys for Magnolia Petroleum Company.

Stevens & Richardson, Stuart, Sharp & Cruce, and Blake & Boys, Attorneys for Defendant in Error, W. T. Price.

OPINION BY HARRISON, C. J.:

This suit grew out of a controversy between the Magnolia Petroleum Company, which owns an oil and gas lease on the NE $\frac{1}{4}$ of Sec. 33, Twp. 1 S. of R. 8 W. 1. M., and W. T. Price, who owns an agricultural lease on the same land.

Under its lease the Magnolia Petroleum Company sought to go upon the land and drill for oil and gas. Price sought to prevent the Magnolia Company from drilling and refused to allow its employees to enter upon the land for drilling purposes, he, Price, being in possession under his agricultural lease and claiming the right to all the oil and gas by virtue of such lease.

On May 25th, 1920, the Judge of the District Court being absent from the county, the Magnolia Company applied to and was granted a temporary order by the County Judge, restraining Price from interfering with the Magnolia Company's drilling operations, and thereafter, on June 4th, the Judge of the District Court, having returned to the county, continued said order in force until June 22nd, and it seems that such order remained in force until March, 1921, and that the Magnolia Company, operating under such order, had drilled some five or six producing wells from which it had taken vast quantities of oil.

On November 18th, Price filed his answer to the Magnolia Company's amended petition, claiming the oil and gas by virtue of his agricultural lease and preference right under the law to purchase, and prayed for an accounting for oil and gas the Magnolia Company had taken from the land.

Before the case was finally disposed of the State intervened

through the Commissioners of the Land Office and the Attorney General, claiming that the title to said lands and the mineral rights were still in the State and that it had executed a valid oil and gas lease to the Magnolia Company and was entitled to its royalties therefrom for the benefit of the State, Section 33 having been reserved by Acts of Congress, by the Enabling Act and the Constitution for public building purposes.

The case was not disposed of by the District Court until March, 1921, at which time the temporary restraining order which had been in force since May, 1920, was dissolved and judgment rendered in favor of Price. Price being adjudged to be the owner of all oil and gas and other mineral rights by virtue of his preference right to purchase when the land should be sold, and the State and Magnolia Company being perpetually enjoined from interfering with said land or with Price's right to the oil and gas and other minerals therein, and an accounting ordered. Both the Magnolia Company and the State had appealed from said judgment.

It being conceded, or at least it being true, that under the law the Commissioners of the Land Office have jurisdiction over public lands of the State with power to lease and sell such lands, the real decisive questions are, whether said Commissioners have done any act which the law did not authorize them to do; or have failed to do some act which the law required them to do. The rights of all parties are to be determined by these questions, and these questions must be determined by the law relating to this subject and the terms of the lease contracts which the State has made with these parties.

The first laws bearing directly upon the question herein involved was the Act of Congress, approved May 2nd, 1890, 26 Stat. L. 81, a portion of which act constitutes the Organic Act of the Territory of Oklahoma. Section 18 of which provides:

"That sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby reserved for the purpose of being applied to public schools in the State or states hereafter to be erected out of the same. In all cases where sections sixteen or thirty-six, or either of them, are occupied by actual settlers prior to survey thereof, the County Commissioners of the counties in which such sections are so occupied are author-

ized to locate other lands, to an equal amount, in sections or fractional sections, as the case may be, within their respective counties, in lieu of the sections so occupied.

* * * .”

Said section further provides:

“All tracts of land in Oklahoma Territory which have been set apart for school purposes, to educational societies or missionary boards at work among the Indians, shall not be opened for settlement, but are hereby granted to the respective educational societies or missionary boards for whose use the same has been set apart. * * * .”

These are all the provisions in the Organic Act which directly pertain to the subject under consideration, and it will be observed that the controlling purpose of the Act was to reserve sections numbered sixteen and thirty-six in each township for school purposes when the Territory became a State. That is, said sections were reserved from homestead settlement in order that when such Territory should become a State said sections might be granted to the State for school purposes and no others. So specific and clear is this idea carried out that it provided in cases where said sections numbered sixteen and thirty-six, or either of them, were occupied by actual settlers prior to the survey thereof, by the government, that the county commissioners of the counties of the Territory should have power to select other lands in lieu of the lands so occupied by actual settlers at the time of the passage of the act, in order that when the Territory became a State it would have sections numbered sixteen and thirty-six in each township, or lands selected in lieu thereof, free and clear of all claims of actual settlers prior to the passage of the act, for common school purposes exclusively, and to reserve same from homestead settlement after the passage of the act. No provision in the entire act is clearer than that the sole purpose of Congress was to reserve said sections from homestead settlement in order that when the Territory became a State it would have such lands as a permanent fund for common school purposes exclusively. No settlers' rights or preference rights of any character are recognized or contemplated except as to those actual settlers in good faith before the passage of the act, and before the survey of the lands by the government, and in such case it authorized the county commissioners to select other lands in lieu of the lands so settled.

To the same effect are all subsequent acts bearing upon the

subject. The Act of March 3rd, 1893, opening the Cherokee Outlet to settlement, made the same reservation as to sections sixteen and thirty-six, and for the same specific purpose. The Executive Proclamation of August 19th, 1893, opening the Cherokee Outlet for settlement, made the same reservation and made a reservation as to section thirteen in each township for University, Agricultural and Normal School purpose, subject to the action of Congress; and section thirty-three of each township for public building purposes. By the Act of March 4th, 1894, Congress ratified the additional reservation made by the President and expressly reserved sections thirteen and thirty-three in each township for the specific purposes mentioned in the President's Proclamation.

The Act of January 18th, 1897, made similar reservations as to Greer County, and for the same purpose. Likewise the Act ratifying the agreement with the Wichita Indians, and the Act of June 6th, 1900, ratifying the agreement with the Kiowa and Comanche Indians, made the same reservations and for the same specific purpose.

This precludes the idea that Congress originally intended to give any person a preference right of any character to said lands. No provision was made in the Organic Act even for the leasing of said lands by the Territory.

Let it be observed also that the title to these lands was not granted to the Territory. They were merely reserved from homestead settlement, the title remaining in the United States until such time as such Territory became a State. The lands themselves were not yet granted, but as the act reads, "*Are hereby reserved for the purpose of being applied to public schools in the state or states hereafter to be erected out of the same,*" and the Territory was not authorized to make any disposition of said lands by lease or otherwise until the Act approved March 3rd, 1891, 26 Stat. L. 1026, section 18 of which provides:

"That the school lands reserved in the Territory of Oklahoma by this and former acts of Congress may be leased for a period not exceeding three years for the benefit of the school fund of said Territory thereof, under regulations to be prescribed by the Secretary of the Interior."

Thus it may be observed that Congress, considering that the Territory had no right theretofore to lease or dispose of

these lands; passed the Act authorizing such lands to be leased for a period *not exceeding three years* for the benefit of the school fund of said Territory, same to be leased by the Governor of the Territory under rules and regulations of the Secretary of the Interior. And thus again it must be observed that the primary purpose of Congress was to provide for a school fund. No provision being made, nothing said about the lessee or his preference right, but it being expressly provided that the lands should be leased for a period not exceeding three years.

In the Act approved May 4th, 1894, 28 Stat. L. 71, Congress made the following provision:

“That the reservation for university, agricultural college, and normal school purposes, of section thirteen in each township, of the lands known as the Cherokee Outlet, the Tonkawa Indian Reservation, and the Pawnee Indian Reservation, in the Territory of Oklahoma, not otherwise reserved or disposed of, and the reservation of public buildings of section thirty-three in each township of said lands, not otherwise disposed of, made by the President of the United States in his proclamation of August nineteenth, eighteen hundred and ninety-three, be, and the same are hereby ratified, and all of said lands and all of the school lands in said Territory may be leased under such laws and regulations as may be hereafter prescribed by the legislature of said Territory; but until such legislative action the governor, secretary of the Territory and superintendent of public instruction shall constitute a board for the leasing of said lands under the rules and regulations heretofore prescribed by the Secretary of the Interior, for the respective purpose for which the said reservations were made, except that it shall not be necessary to submit said leases to the Secretary of the Interior for his approval; and all necessary expenses and cost incurred in the leasing, management and protection of said lands and leases may be paid out of the proceeds derived from such leases.”

The only difference in the foregoing Act and section 18 of the Act of March 3rd, 1891, is that under said section 18, the Governor was authorized to lease the reserved lands under rules prescribed by the Secretary of the Interior, while under the foregoing Act of May 4th, 1894, the Territory was au-

thorized to lease same under such laws and regulations as might thereafter be prescribed by the Legislature of the Territory. But until the legislature enacted laws and prescribed rules, the Governor of the Territory, the Secretary of the Territory and the Superintendent of Public Instructions of the Territory constituted a board for leasing said lands under the existing rules prescribed by the Secretary of the Interior "for the respective purposes for which the said reservations were made, namely, sections numbered sixteen and thirty-six for common school funds; section numbered thirteen for funds for the University and other designated educational institutions; and section numbered thirty-three as a fund for public buildings." Nothing yet said about the lessee or a preference right.

The next legislative act pertaining to the subject, either by Congress or by the territorial legislation, was Council Joint Resolution Number Sixteen, S. L. 1895, 273, to wit:

"That in case the legislative assembly fails to enact legislation governing the leasing of lands subject to lease in this Territory, the present board having control of leasing of public lands be and are hereby authorized to continue the leasing of such public lands. Provided, also, they are authorized to lease lands lying west of range fourteen (14) in such quantities as in their judgment may be most advantageous to the public interest. Approved March 8th, 1895."

Nothing is said in any act so far about a preference right. However, after the passage of the Act of May 3rd, 1891, 26 Stat. L. 1026, which authorized the leasing of such lands for a period not exceeding three years under regulations to be prescribed by the Secretary of the Interior, the Secretary of the Interior adopted a rule of which the following is a part: "In case a new lease is made at the end of the third year, the preference right shall be given the former lessee."

Without deciding the question whether the above clause in the Secretary's regulations exceeded the limitations placed by section thirty-six of the Act of May 3rd, 1891, such question not being material to the decision of this case, this rule of the Secretary is the first expression or first attempt to extend a preference right to the lessee, and whether it exceeded the limitations placed by said act by granting a *preference right* to re-lease when the act says it shall be lease for a period *not exceeding three years*, is immaterial to decide, and with-

out deciding this question, we do decide that said rule does not grant to the lessee a perpetual preference right to lease any of said lands, nor does it impose upon the Territory the obligation to perpetuate the lease granted in the event it appeared to the Territory that it was to its better interest not to re-lease such lands. The rule merely provides in case a new lease is made, without imposing any compulsory obligation to make such lease, but in case a new lease is made at the end of the third year, "the preference right should be given the former lessee."

The next legislation materially bearing upon the question of "preference right" is contained in the Enabling Act and the Constitution of the State. These two acts constitute a contract and compact between the government and the State of Oklahoma. On the part of the government they constitute a grant with certain conditions. On the part of the State they constitute an acceptance of a grant and an acquiescence to the conditions. Previous to this time the title to the land was in the government. After the adoption of the Constitution this completed contract superseded all previous agreements, reservations, rules and regulations with reference to the land and completed its conveyances to the State. Hence, it is immaterial what the various legislative acts had been prior to this time and immaterial as to what regulations may have been promulgated prior to this time.

We have referred to previous acts of Congress and legislative acts of the Territory and the rules and regulations pertaining to this land for two purposes. First, to answer the contentions of defendant in error, Price, that Congress gave to the lessee the absolute right to use and occupy the land in definitely and in perpetuity by reason of the preference right to re-lease under the Secretary's rule; and second, to show that the primary purpose of Congress, throughout all the acts pertaining to these lands, was to provide for a school fund and other designated funds for the State and to enforce subservience to the best interest of such funds.

Sections seven, eight, nine and ten of the Enabling Act, or as much thereof as pertain to the subject involved, are as follows:

Section Seven. "That upon the admission of the State into the Union sections numbered sixteen and thirty-six in every township in Oklahoma Territory and all indemnity lands heretofore selected in lieu thereof, are hereby

granted to the State for the use and benefit of the common schools. * * * There is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of five million dollars for the use and benefit of the common schools of said State in lieu of sections sixteen and thirty-six. * * *"

Section Eight. "That section thirteen in the Cherokee Outlet, the Tonkawa Indian Reservation and the Pawnee Indian Reservation, reserved by the President of the United States by proclamation issued August 19th, 1893, opening to settlement the lands, and by any act or acts of Congress since said date, and section thirteen in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said state for the use and benefit of the University of Oklahoma and the University Preparatory School, one-third; of the normal schools now established or hereafter to be established, one-third; and of the Agricultural and Mechanical College and the Colored Agricultural Normal University, one-third. The said lands or the proceeds thereof as above apportioned shall be divided between the institutions as the Legislature of said State may prescribe. Provided, that the said lands so reserved or the proceeds of the sale thereof shall be safely kept or invested and held by the said State and the income thereof, interest, rentals or otherwise, only shall be used exclusively for the benefit of said educational institutions. Such educational institutions shall remain under the exclusive control of said State and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college or university.

That Section thirty-three, and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation and acts, for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the Legislature of said State may prescribe.

Where any part of the lands granted by this Act to the State of Oklahoma are valuable for minerals, gas and oil, such lands shall not be sold by the said State prior to January 1st, 1915; but the same may be leased

for periods not exceeding five years by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require and the advertisement shall specify in each case a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which that shall properly belong, and no transfer or assignment of any lease shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing; Provided, however, that agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest therein by reason of such mining operations. The Legislature of the State may prescribe additional legislation governing such leases not in conflict herewith (34 Stat. L. 273)."

Section Nine. "That said sections sixteen and thirty-six, and land taken in lieu thereof, herein granted for the support of common schools, if sold, may be appraised and sold at public sale in one hundred and sixty acre tracts or less, under such rules and regulations as the legislature of the said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of such schools. But said lands may, under such regulations as the Legislature may prescribe, be leased for periods not to exceed ten years; and such lands shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only (34 Stat. L. 274.)"

Section Ten. "That said sections thirteen and thirty-three aforesaid, if sold, may be appraised and sold at public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods

of not more than five years, under such rules and regulations as the Legislature shall prescribe, and until such time as the Legislature shall prescribe such rules these and all other lands granted to the State shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the laws of the United States, whether surveyed or unsurveyed, but shall be reserved for designated purposes only, and until such time as the Legislature shall prescribe as aforesaid such lands shall be leased under existing rules. Provided, that before any of said land shall be sold, as provided in sections nine and ten of this Act, the said lands and improvements thereon shall be appraised by three disinterested appraisers, who shall be non-residents of the county wherein the land is situated, to be designated as the Legislature of said State shall prescribe, and the said appraisers shall make a true appraisal of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereof at their fair and reasonable value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall, under such rules and regulations as the Legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements and to the State the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract at less than the appraisal thereof shall be accepted (34 Stat. L. 274)."

The foregoing provisions of the Enabling Act constitute the grant of the lands in question, and all the conditions pertaining thereto.

The provisions quoted above from section seven shows the purpose of Congress and the conditions imposed as to sections sixteen and thirty-six, to wit: "For the use and benefit of the common schools," and the latter quotation from section seven, *supra*, shows the purpose and conditions imposed by the gift of five million dollars in money, to wit: "For the use and benefit of the common schools" of the Indian Territory, there being no reservations of land on the Indian Territory portion of the new State.

Section eight constitutes the grant, the purpose of the grant and the conditions pertaining to section thirteen, to wit:

"For the use and benefit of the University of Oklahoma and other schools."

Section eight further provides: "That section thirty-three and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation and Acts for charitable and penal institutions and public building, shall be apportioned and disposed of as the Legislature of the State may prescribe." Section eight provides also that none of the lands granted by the Act, if valuable for minerals, oil or gas, shall be sold prior to January 1st, 1915, but may be leased for the periods and in the manner prescribed in the latter part of section eight, *supra*.

Section nine provides: That section sixteen and thirty-six "*if sold*" may be sold in the manner prescribed by section nine.

Section ten of the Act provides: That said sections thirteen and thirty-three "*if sold*" may be sold in the manner prescribed in section ten.

These sections constitute all the conditions imposed upon the State, and there is no hint in any of said sections, nor in all of them construed together, that the State, unless it elected to do so, was compelled to sell any of said lands. They simply provide that, "*if sold*," they must be sold in the manner prescribed. And as to said lands, the State was not required to sell at all. It could have retained all of said lands and never sold a foot of same, had it so chosen, and yet not violated any of the conditions of the grant. But said grant provided that such lands "*if sold*," should extend a preference right to the lessee in possession, "at the time of the sale," to purchase at the highest bid. This is the only obligation imposed on the State as to the sale, except that under the proviso in section ten, if such lands should be sold at all, then the lands and improvements should be appraised in a certain manner, and the very fact that said section provides that in case the lessee does not become the purchaser, he shall be paid the appraised value of his improvements, shows that Congress had no thought of granting to the lessee the absolute right to purchase, a right which he could enforce against the State whether the State chose to sell the land or not.

The State was not obligated to sell at all, but if it chose to sell, then it should appraise the land at its "actual cash value" and the improvements at their "fair and reasonable value," and in the event the leaseholder refused to pay an

amount equal to the highest bid for the land at its "actual cash value" and the improvements at their "fair and reasonable value," then his rights in the premises were ended. The only right he had left in such case was the right to the appraised value of his improvements. That is, if he refused to meet the best bid, then he had no further rights than the right to recover for the appraised value of his improvements.

Under section 1, article 11, of the Constitution, these lands were accepted by the State under and with the conditions imposed by sections 7, 8, 9 and 10 of the Enabling Act. This completed the transfer of the title from the government to the State. After the adoption of the Constitution the State could dispose of said lands as it saw fit, except that it could not violate the conditions it had accepted, and no condition was contained in the Enabling Act which required the State to sell any of said lands unless it saw fit to do so.

Section 4, article 11, of the Constitution, provides that all lands accepted under such grant and the conditions thereof *may* be sold by the State under rules and regulations prescribed by the Legislature and in conformity with the regulations of the Enabling Act.

This completes the contract between the State and the government. The grant by the government and the acceptance by the State, which supersedes all previous agreements and reservations. The State now has complete control of such lands to lease or not to lease if it so chooses; to sell or not to sell if it so chooses. Should it sell any of them or lease any of them, such sale or lease must not violate the conditions of the grant. Hence, the State, by section 32, article 6, of the Constitution, created the Commissioners of the Land Office composed of the Governor, Secretary of State, State Auditor, Superintendent of Public Instructions and President of the Board of Agriculture, and expressly gave to such Commissioners complete jurisdiction and charge of the sale, rental, disposal and management of the lands in question, and the funds derived therefrom, under rules and regulations prescribed by the Legislature.

Under the Acts of 1907-8, Acts of 1909, and Acts of 1910-11, and subsequent Acts (see chapter 69, R. L. 1910), the Legislature provided for the sale and the leasing and re-leasing of said lands and prescribed the manner and method under which the Commissioners of the Land Office were to be governed.

It is our opinion, after an examination of such statutes and

various acts, that none of them violate any of the conditions imposed by the grant aforesaid, nor do they violate the provisions of the State Constitution. If the statutes do not violate the conditions of the grant nor the provisions of the Constitution, the next question is whether the Commisisoners of the Land Office have violated any statutes under the powers given them by the Constitution.

This question must be determined by the statutes, the Constitution and the terms of the respective leases held by the Magnolia Company and by the defendant in error, W. T. Price. Neither the Magnolia Company nor Price can claim anything beyond the provisions of the law and the terms and conditions of their respective lease contracts.

Article 111, chapter 69, R. L. 1910, authorizes the Commissioners of the Land Office to segregate oil, gas and other mineral lands and to reserve the rights for the State to all oil, gas and other mineral lands from the surface lessees, and authorizes said Commissioners to lease said lands for oil and gas and other mineral purposes and prescribes the conditions and regulations under which the same may be done.

As appears from the record herein, the Commissioners duly segregated the lands in question from sale because of the oil and gas supposed to exist therein, and the enormous product of oil and gas that has been taken from the tract in question conclusively warrants the Commissioners in so segregating said tract from sale.

The land, at the time of the trial of this cause in the court below, as appears from the record, had five or six producing wells, each producing great quantities of oil, the royalties from which amount to a hundred fold more to the State than the sale of such land for agricultural purposes would have amounted to. Under the lease through which Price held possession, by the terms of which he is bound and beyond which he can claim no rights, no mention is made of his right to the oil and gas or other minerals. The only rights he had were those defined by his lease contract with the State and those defined by the laws of the State, which rights, as defined both by the laws and by his lease contract, are no more than the preference right to re-lease such land for agricultural purposes at the expiration of his lease, if the State elects to re-lease it, and the right to purchase same when sold by the State if the State should sell it. He has no right, under the law nor under his lease contract, to force the State to sell such

lands until the State elects so to do. Neither under the terms of his lease nor under the law could he force the State to re-lease such lands to him at the expiration of his present lease if the State elected no longer to lease same for agricultural purposes, nor could he force the State to sell until the better interest of this particular State fund would be better served by a sale.

The State is bound by the terms of the Constitution and by the terms of the grant to protect him in his preference right to re-lease if the land is re-leased, and the preference right to purchase, at the time of sale, if the land is sold. This is as far as the State is obligated to the lessee without violating the conditions of the grant itself, the uppermost purpose in the grant being to protect the school, educational and public building funds, for which purposes the land was granted to and accepted by the State.

The Commissioners of the Land Office could not have acted in good faith to the trust imposed in them by the Constitution and by the statute if they had advertised this land, believing that it contained oil and gas products which would pay a hundred fold more to the State than the sale of the land would pay, but, as a matter of course and as a matter of law, had the State sold and conveyed such land to the lessee, then the lessee would have had the right to the oil and gas therein, but the State has not sold it and the lessee has not purchased it, and until the land is sold and purchased by the lessee and fee simple title conveyed to the lessee, such lessee has no right to the oil and gas or other minerals therein.

It appears from the record and suggested in the briefs that at one time this land had been appraised and advertised for sale as prescribed by law, but withdrawn from the market before the sale was made, and that if Price had any right to enforce a sale he should have procured such right through a proceeding in mandamus for the enforcement of the sale. Whether this proposition be true or not we deem immaterial. The fact is that he did not, therefore it is unnecessary to decide whether, under the terms of his lease and the provisions of law, he could have enforced the sale of such lands until the State elected to sell same. Nor is it necessary to decide that if the lands had been sold and conveyed to Price by the Commissioners of the Land Office, knowing that it was swimming in rich pools of oil and gas, whether they could have been

criminally prosecuted for making such sale, knowing such state of facts. The fact is that they were apprised of the oil values of the land, and in consonance with the trust reposed in them, they acted for the better interest of the State.

We have examined the various acts of Congress and all of the acts of Congress upon this question, including the Enabling Act, and have also examined and are reasonably familiar with the provisions of our State Constitution. We have also examined the various acts of the State Legislature with reference to the sale and leasing of the public lands,, and have examined the form, terms and conditions of the lease contract under which defendant in error, Price, claims, and are of the opinion that neither under the terms of his lease, the provisions of the statutes, the Constitution, nor the conditions of the Enabling Act, when applied to the facts in this case, is he entitled to the oil and gas therein, nor entitled to anything with reference to the oil and gas lease in question further than that prescribed by law, to wit: Any and all damages that he may sustain to his agricultural lease by reason of the operation of said oil and gas wells. If the drilling operations upon this land and the operation of the wells thereon have damaged him to any extent in the free exercise of his agricultural lease, he is entitled to such damages as he has sustained, but he is not entitled to the oil and gas nor the royalties from the wells, nor authorized to unduly interfere with the operations of same.

It is, therefore, our opinion that the trial court erred in dissolving the temporary injunction granted in the first place and in rendering the judgment herein appealed from.

The judgment is therefore reversed and the temporary injunction against defendant in error, W. T. Price and his wife, Ora Price, is hereby made perpetual and the said defendants in error are hereby perpetually enjoined from interfering with the operations of said oil and gas lease, and the State is hereby decreed to be entitled to all royalties of oil and gas produced under said lease, and defendants in error are decreed to be entitled to such damages as they may have sustained to their agricultural lease by reason of the operation of said oil and gas lease.

All the Justices concur.

(Filed in Supreme Court of Oklahoma April 5, 1922. William M. Franklin, Clerk)

In the Supreme Court of the State of Oklahoma.

Case No. 12,243

MAGNOLIA PETROLEUM COMPANY ET AL., Plaintiffs in Error,

vs.

WILLIAM T. PRICE ET AL., Defendants in Error.

Preface to Petition for Re-Hearing.

The formal statement of assignments may be briefly summarized in the following points:

FIRST: The Court acknowledges in the opinion that Price's preference right to re-lease and to buy must be protected and yet permits the Magnolia oil and gas lease to stand, which lease must be a lease or sale to the Magnolia of the rights that the opinion says Price has, without his consent and without opportunity for him to exercise his right to re-lease or to buy.

SECOND: That the opinion overlooks the law commanding the sale of Sections 33 and fixing all the terms thereof (Sess. L. 1909, p. 448), and commanding the Commissioners to execute same in penalty of felony.

THIRD: That the opinion applies the Act of 1908, Sess. L. p. 4, to lands and lessee having preference right attached, which said statute was not so intended, and applies it to extinguishment of such right, which results:

- (a) In impairment of lessees' contract.
- (b) In taking property without due process.
- (c) In taking property without compensation.
- (d) In taking private property for private uses.

All of which are in violation of the Constitution of the United States.

FOURTH: That action by the State and action by the Commissioners is not distinguished and the application made in this opinion of the action of both violates the United States Constitutional guarantees.

In the Supreme Court of the State of Oklahoma.

Case No. 12,243

MAGNOLIA PETROLEUM COMPANY, a joint stock association;

John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly and W. C. Proctor, Trustees, Plaintiff in Error (and plaintiff below),

STATE OF OKLAHOMA, ex rel. Commissioners of the Land Office of the State of Oklahoma, and ex rel. S. P. Freeling, Attorney General of the State of Oklahoma, Plaintiff in Error (and intervenor below),

VS.

WILLIAM T. PRICE and ORA PRICE, Defendants in Error.

Petition for Re-Hearing.

Come now William T. Price and Ora Price, and move the Court to grant a rehearing in the above entitled cause from the opinion and judgment of this Court rendered on the 21st day of March, 1922, which judgment and opinion of this Court materially affect the substantial rights of the defendants in error upon the following grounds, to wit:

(1) The Court overlooked the Rules and Regulations adopted by the Secretary of the Interior, approved by the Act of Congress giving to the lessee the preference right to re-lease the land, and their effect as investment of right.

(2) The Court overlooked the lease contracts made pursuant to the Rules and Regulations and the Acts of Congress by the Territorial Board of School Land Commissioners, in which the preference right to re-lease the lands was specifically granted to the lessees; copy of one of such leases appearing on record, pages 247-250.

(3) The Court overlooked the case of *Noel v. Barrett*, 18 Okla. 304, 90 Pac. 12, and *Clark v. Frazier*, 117 Pac. (Okla.) 589; in each of which cases this Court has held that the preference right is a property right. The Court also overlooked that by reason of these cases the construction of the law in force at that time by this Court in such decisions has become a rule of property and is controlling in the case at bar.

(4) The Court overlooked the fact that in the advertising of leases on school lands in territorial days, and under the laws then in force, the leases were advertised and the person bidding thereon was required to pay the rental as appraised, together with such bonus as he may see fit to offer for the rights under the lease; and that the Government of the United States acting under the legislation of Congress and the Territorial Board of School Land Commissioners acting under the

power given them by Congress, accepted such bonus money and persons bidding paid such bonus moneys for the purposes of obtaining said lease, and the preference right to re-lease such lands that went with it.

(5) The Court overlooked the provisions of Section 8 of the Enabling Act which provides that the State may only be permitted to lease known mineral lands for a *period of five years only*. The Enabling Act did not grant a preference right to an oil and gas lessee to re-lease nor to buy. The Magnolia lease in the case at bar is for five years and as long thereafter as oil and gas may be found clearly violative of the five-year limitation provision in Section 8 of the Enabling Act.

(6) The Court overlooked Section 10 of the Enabling Act which gave to the lessee the preference right to purchase the lands when sold without regard to their mineral character insofar as the lands involved in this case are concerned, the lands here being Section 33.

(7) The Court overlooked the opinions of the Supreme Court of the United States holding that the mineral or non-mineral character of lands granted by the Government are to be determined as of the time of the grant. Such cases are:

Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 31 L. Ed. 182.

U. S. v. Iron & Silver Min. Co., 128 U. S. 673, 32, L. Ed. 571.

Shaw v. Kellogg, 170 U. S. 312, 42 L. Ed. 1050.

Wyoming v. U. S., 65 L. Ed. 453.

Diffenback v. Hawk, 115 U. S. 393, 29 L. Ed. 423.

Green v. Robinson, 210 S. W. (Tex.) 498.

(8) The Court overlooked the provisions of Section 10 of the Enabling Act which enacted certain Rules and Regulations for the sale of the lands when sold and permitted the *Legislature of the State only* to make certain limited other rules and regulations, and which Act nowhere authorizes the Legislature to delegate such powers to the Commissioners of the Land Office.

(9) The Court in its opinion fails to distinguish between the authority granted to the Legislature of the State of Oklahoma by the Enabling Act, which is or would be the Act of the State, and the unauthorized acts of the Board of School Land Commissioners which are not the acts of the State. And on the question as to whether or not the Legislature can dele-

gate the authority granted it by the Enabling Act, the Court overlooked the cases as follows:

Betts v. Commissioners of Land Office, 27 Okla. 64, 110 Pac. 766.

Haskell v. Haydon, 126 Pac. 232, 33 Okla. 578.

Errien v. U. S., 251 U. S. 41, 64 L. Ed. 128.

Walpole v. State Bd. of Land Com., 163 Pac. (Colo.) 848.

(10) The Court declares (Written Op. p. 14; App. Ct. Rep. p. 512, Col. 2), that the Constitution gave the Commissioners "complete jurisdiction and charge of the sale and leasing of said lands." The Court here overlooks the Constitution which is utterly silent in "jurisdiction" complete or incomplete, but limits them to "charge of sale, etc., under the rules and regulations prescribed by the Legislature." Hence, they had no "rule" power or "regulation" power.

Our Court in *Haskell v. Haydon*, 33 Okla. 518, 126 Pac. 232, said of the Commissioners and Legislature that in the Legislature "lies the sole authority to prescribe rules and regulations," relating to these lands. It follows, therefore, that if the "sole authority" lies in the Legislature that none of it lies in the Commissioners. It follows therefore that they have no "jurisdiction" and are "in charge" of the sale and leasing as merely administrative officers of the law.

The Court overlooked this controlling authority cited in our brief.

(11) The Commissioners having no "jurisdiction," then it remains to see what the State by legislation has done.

The Court in its opinion, page 8, says of the Enabling Act and Constitution: "On the part of the Government, they constitute a grant with certain conditions. On the part of the State they constitute an acceptance of the grant and acquiescence to the conditions" (Op. p. 8, middle, 17 Okla. App. Ct. Rep. 510, col. 1 middle). Then, if the grant carried "conditions" and if the state "acquiesced" in them, how could the State have "complete control" to avoid or deny the conditions? It could not and the Court so recognizes in words on page 14 (17 App. Ct. Rep. 512, col. 1 bottom), where the Court says:

"Should it sell any of them, or lease any of them, such sale or lease must not violate the conditions of the grant."

Now, one of the "conditions" was the preference right

entailed on the land, and running to the lessee, either to release, or to purchase. Then how could it be either leased or purchased by the Magnolia against Prices' said right?

A preference right is an option; a property right, and a valuable one.

Noel v. Barrett, 18 Okla. 304, 90 Pac. 12.

It is subject to purchase and sale.

Clark v. Frazier, 177 Pac. (Okla.) 589.

It is not to be extinguished except by the method contained in the grant thereof.

Slusher v. Simpson, 67 S. W. 380, 23 Ky. L. R. 252,

It is operated to the exclusion of others.

Bratton v. Commissioners, 22 Kans. 674.

It is a vested right.

Wing v. Dunn, 127 S. W. 1101 (Tex.).

White v. Douglass, 11 Pac. 860 (Calif.).

One who purchased from another holding under law that gives preference right is entitled to same privilege and benefit.

Twigg v. State Board, 75 Pac. 729 (Utah).

Such an one has the rights which the law gives him regardless of any instrument, or terms thereof fixed by the agents of the law.

Burke v. So. Pac., 234 U. S. 669, 58 L. Ed. 1527.

Therefore, the law of Congress having given this right and the State Constitution having accepted subject to this right, no action of the Commissioners could take it away. The law making power itself could not take it away. It is a statutory contract in which the lessee had no voice except to accept under it (*Buske v. So. Pac.*, 234 U. S. 669, *supra.*), but when accepted by lessee as here, even Congress or the Legislature could not deprive.

State ex rel. v. McPeak, 47 N. W. 691 (Neb. by Maxwell).

The Supreme Court says that to do so "impairs the obligation of contract with the State which had been consummated by a compliance with the Act (a former law) and therefore violative of the Constitution of the United States."

We invoked the protection of the Constitution of the United States in our pleadings, arguments and briefs and now again invoke its protection. It was overlooked by the Court.

(12) The Court overlooked the proposition of the legal effect of the lease, with preference right of renewal so long as lessee complies with the lease, and the preference right to

buy, if sold, and overlooked the controlling authorities cited thereon.

DePeyster v. Michael, 57 Am. Dec. 470.

(13) The Court overlooked the proposition that the Commissioners of the Land Office can not change the lease terms, conditions or provisions as fixed by law by exacting from the lessee or giving to the lessee an instrument called "lease" containing provisions, stipulations, limitations, grants, or reservations not expressed in the law.

State ex rel. v. McPeak, 47 N. W. 691 (Nebr.).

Wing v. Dunn, 127 S. W. 1101 (Tex.).

State ex rel. v. Buttzville Bank, 141 N. W. 105 (N. Dak.).

Burke v. So. Pac., 234 U. S. 669, 58 L. Ed. 1527.

Bratton v. Cross, 22 Kans. 674.

(14) The Court overlooked the proposition that when the legislative authority grants use, or title, or means of acquiring title to public lands with express privileges or opportunities, and the grantee takes thereunder that the grantee's rights are contractual by nature and cannot be impaired by subsequent legislation or administration because protected by the Constitution of the United States.

State ex rel. v. McPeak, 47 N. W. 691.

Burke v. So. Pac., 234 U. S. 669, 58 L. Ed. 1527.

(15) The Court overlooked the proposition that when the Legislature of 1909 passed Session Laws 1909, page 448 *et seq.* that such statute, containing as it does all the proposed terms and conditions of the sale, constituted a legislative sale; and that it only remained for the Commissioners to carry it out, and their neglect and refusal to do so can not prejudice the rights of one against whom their design or neglect is directed, and that the beneficiary under such legislation takes an enforceable and defensible equitable title. Then he has done all the law imposed on him.

Lytle v. State of Ark., 9 How. 333, 13 L. Ed. 153.

(16) The Court overlooked the proposition that statutes or legislation unexceptional on face, and having a legitimate field of operation, may be so construed or applied by the executive or judicial action, or by both or either, as to impinge the constitutional rights and protection of the citizen affected and thereby become unconstitutional as to him.

(17) The Court overlooked the fact in law that the alleged segregation statute of 1908, Sess. L. p. 448, was repealed by Sess. L. 1909, p. 448, providing sale of all of Section 33.

(18) The Court overlooked the trust nature of State's title and that lessee of Section 33 is a beneficiary under the grant as well as the funds to which use they are dedicated.

Ervien v. U. S., 251 U. S. 41, 64 L. Ed. 128.

(19) The Court overlooked the point that here the Magnolia claims under a lease that "grants" the oil and gas "in and under" certain lands. Such is a sale, if valid, is of "unlimited duration"; and of a free hold interest in the land.

Texas Co. v. Daugherty, L. R. A. 1917-F, p. 989, and cases cited.

Hoyt v. Fixico, 175 Pac. 517.

Then Prices' land was sold, if valid, to the Magnolia in disregard of his preference right to purchase when sold.

(20) The Court says (opin. p. 15) that the Commissioners "*duly segregated the lands*" and the "*enormous product of oil conclusively warrants,*" etc. Of course, if amount of product of oil measures compliance with the law, that is proof enough. But their warrant is measured by the *terms* of the *law*, not the subsequent results of the drill. That is the difference between law and business. One is measured precedent—the other subsequent.

This controlling statute, if it is valid, was also overlooked as to its terms. But was it valid as to the Prices?

The Legislature said if it "is known to contain oil or gas" or "where deemed valuable for oil and gas" the Commissioners shall enter of record their *finding*, declaring such character exists."

Here then we have a law that allows an officer to make a "finding" of oil or gas character, on a "deem." This is contrary to nature. This Price land was not "known" to contain oil and gas until 1921. It was never "deemed" so, but in 1915, by *Resolution*, the Board arbitrarily "declared valuable for mineral purposes" (Rec. p. 153) (Defts' brief p. 4). Not because it was "known" or "deemed" to be mineral character as by *statute* required, but because: "*Whereas, we have had offers from reputable parties to place oil and gas bids on the following unsegregated school lands.*" (It was not school land.) This did not comply with the law, even if the law be held otherwise valid in itself, as legislation.

This statute made no provision for notice to Prices', the lessees, of such contemplated "finding" of "mineral character" which would remove them from a preferred class into

a non-preferred class; that would take their homestead from them; made no provision for hearing as preliminary to such "finding." No notice was to be, or was given; no hearing had. It was perfectly arbitrary. And to give effect to the action of the Commissioners is the taking of property without due process of law; without compensation, and violates the Constitution of the United States. This, too, was called to attention of Court and was also overlooked.

If it is decided herein that Sess. L. of 1908, p. 490, or any other statute, or all other statutes of Oklahoma, "authorize" the segregation of this defendants' land in Section 33 in that part of the State formerly Oklahoma Territory, and under lease and occupied by defendants in error as public land lessees, against the lessees' preference rights therein granted under the Enabling Act and the Constitution of the United States, and granted to and acquired by defendants in error in territorial history by compliance with the laws, rules and regulations, with the force of law in territorial times; and that notwithstanding the preference right granted and recognized in Session Laws 1909, page 448, Section 3b; then, that to the extent that either the statute, or statutes of the State, or the construction or application thereof by the Commissioners, or this construction or application thereof by this Court, or any other Court, contravenes such right, it impairs the contract of these defendants in error and is in violation of the Federal Constitution, and is void, and this opinion, we think, so does.

That under this contention, and under the Statute of March 1, 1919, the defendants in error are entitled to have their case heard on oral argument before the whole Court. That this right has been denied defendants, and is a denial to defendants in error of due process of law provided.

(21) That this opinion recognizes in Prices, lessees, their "preference right to re-lease if the land is re-leased, and the preference right to purchase, at the time of sale, if the land is sold. This is as far as the State is obligated to the lessee without violating the conditions of the grant itself," and yet denies him enforcement thereof, and relegates him to "damages to his agricultural lease," without regard to compensation for his right, and is therefore an unconstitutional application or construction of the law, impairs defendants' contract, takes their property without due process of law, and without compensation, and is unconstitutional and void under United States Constitution. That even if the Legislature

could and did authorize the leasing for oil and gas purposes of lands not known to contain oil or gas, yet it did not do so, or attempt to do so, in violation of lessee's preference rights; and therefore if the legislation was and is otherwise, or on face valid, that as applied in this case by this opinion and to these defendants, it is unconstitutional and void for said reasons.

(22) That this opinion extends even the statute beyond its terms, and is extra-judicial and by its terms and order impairs defendants' contract under the law, and takes defendants' property without compensation or due process of law, and is unconstitutional and void.

(23) The Magnolia lease was beyond the law, and void. The Stat. of 1909, p. 490, provided for a lease "not exceeding five years, with suitable provision for preference right or re-lease for second term of five years."

This violated the provisions of the Enabling Act which limited leasing of *known* mineral lands to "not exceeding five years" (Enabling Act, Sec. 8) and prohibited legislation in conflict (Enabling Act, Sec. 8, last proviso).

The Magnolia lease in suit is lease for "five years and as long thereafter" as oil and gas may be found. This is an alienation, not a lease. *Hoyt v. Fixico* (Okla.), 175 Pac. 517. This violates the Enabling Act, Section 8, and violates the trust accepted by the State, and is *void*. This, too, was called to the Court's attention and overlooked.

Section 8 of the Enabling Act, last sentence, prohibited any legislation "in conflict" therewith. This statute for a "second term of five years," and this lease "five years and as long as oil or gas is produced," both expand and conflict with the absolute five year limitation. This, too, was overlooked.

In 1913, by Revised Laws, this language is changed in (Sec. 7197) to "preference right to re-lease for a second term of five years."

Now, if this land had come to the State untrammelled with conditions, this was probably a fit subject for legislation. But here it is not. This, too, was by the Court overlooked.

(24) The Court declares and finds that the State by its Legislature has by legislation of 1907-08 and 1910-11 provided for the sale of said lands. Opinion p. 14, 17 Okla. App. Ct. Rep. 512, second column.

This was the claim of defendants in error, but the Court says it is its "opinion" that none of them violate the con-

ditions imposed by the grant (Enabling Act). The Court proceeds then to declare that Price, the lessee of this land, had no right therein, that he could protect from plaintiffs, which claimed under an oil lease made in 1919.

The Court here lastly overlooks the Statute of 1909 (Sess. L. 448-9, Sec. 1. App. Mch. 2, 1909), which said the Commissioners "shall sell" these lands and prescribe all the conditions of appraisal, advertisement and terms of payment. That Statute said "The Commissioners * * * shall dispose of, sell and convey, subject to the limitations, etc., of the Enabling Act, in this Act * * * all the following enumerated lands * * * all lands," etc.; also "all lands embraced in Section 33 in former Oklahoma Territory," etc. In Section 3b, it is enacted "any lessee holding a lease on any lands described in Section 1 of this Act (excepting New College lands), (and this 33 is not new college land) shall have the preference right to purchase 160 acres so leased at the highest bid," etc. (p. 451).

This statute, Section 1 (Sess. L. 1909, p. 448), provides for the sale "subject to such

Limitations

Exceptions

Conditions

Rules

Regulations and

Instructions

as provided in Enabling Act, in this Act," or amendatory acts.

Now, what were the limitations, etc., in the Enabling Act?

In Section 10, it is provided that Section 33 "if sold," may be sold in (a) 160 acre tracts; (b) under such rules and regulations as the Legislature may prescribe; (c) Preference right to purchase at highest bid being given to lessee."

The "if sold" proposition is settled by the above quoted law that the Commissioners "shall sell" the sections number 33; also by this opinion, p. 14, where this Court says "under the Acts of 1907-08, 1909, 1910-11, etc., the Legislature provided for the sale." It being so disclosed, we fail to see why this Court consumes pages of opinion to demonstrate the obvious condition that the State could not be *made* to sell this land. Such question was never presented.

Defendants in error alleged that that bridge had been crossed by Act of 1909. That the State had elected to sell;

had legislated to that effect and charged the Commissioners with the duty of carrying out that law (Sess. L. 1909, 448-9, Sec. 1, *et seq.*). That law fixed all the terms and conditions (see our brief, pages 99-103). It preserved this preference, so by what authority is it now denied?

(25) If this Statute (Sess. L. 1909, p. 490) is invalid as to Prices, that too was overlooked. The Federal law opened land to pre-emption, excepting "known minerals." The Court said that that required "ascertained coal deposits of such extent and value as to make the land more valuable as a coal mine," and that mere "indications of coal beds as shown by outcroppings" was insufficient.

Colo. C. & I. v. U. S., 123 U. S. 307, 31 L. Ed. 182 (brief pa. 67).

Also, that outcroppings did not prove a lode or vein to constitute "known minerals."

U. S. v. Iron & Silver Min. Co., 128 U. S. 673, 32 L. Ed. 571.

Other cases consistent were cited in our brief at pages 68, 69 and 70.

Now, this was the law in light of which the Enabling Act, Section 8, referred to "lands valuable for minerals."

These controlling authorities were cited and overlooked. Can it be then that our Commissioners can "whereas we have had offers to place oil and gas bids," and from said "whereas" declare a land to contain oil and gas, to the prejudice of the preference right holder?

This statute, if otherwise valid, did not contain any recognition of Prices' preference right to re-lease (the lands for mineral) if they were mineral, or in any way respect his preference rights to either lease or buy, if mineral, nor provide any way to extinguish his rights therein, statute therefore, as to him, violated the Constitution of the United States and impaired his contract rights in the land, given by Act of Congress (Enabling Act) and accepted by him.

(26) The Statute of 1908, p. 490, *et seq.* and Rev. L. 1910, Sec. 7199, and the Resolution of the Commissioners of 1915, Rec. 153 (Defts' brief p. 4), if given the effect they are by this decision and as applied by this decision, takes defendants' property without notice, or hearing, or opportunity to be heard, or compensation, and therefore is without due process of law and prohibited by the Constitution of the United States, which defendants invoked and yet invoke, and which United

States Constitution, a controlling enactment, was by the Court also overlooked.

(27) We have above quoted the opinion that "the State is bound to" protect him (Price) in his preference right to re-lease if the land is leased, and the preference right to purchase if the land is sold" (Op. p. 16, 17; Ok. Ap. Ct. Rep. 513, 1st col. middle).

Now, this is all we contend for, as a matter of law. Now, we want it as a matter of fact. The order denies him everything but damages to his "agricultural lease" which has not been paid or tendered (Opin. last page).

Now, when did the transition take place from the State being "bound to protect in his preference right" to now being bound over to allow only "damages" for "injury to his agricultural lease by operation of the wells" (Opin. p. 18). We find nothing between pages 16 and 18 to account for this change of relief. This land was either leased to the Magnolia in violation of his preference, or sold to it in violation of his preference.

Hoyt v. Fixico, 175 Pac. 517.

(28) Much of the opinion relates to "subservience to the fund," but none to the subservience of the lessee, who contributed to the fund through eighteen years of toils, or of his crops, or orchards, or fences or buildings, or other things of value contributed to the land.

The preference right was in subservience to the fund; and to the lessee. To encourage him to make it a homestead to which he could look with permanence, instead of a "chain harness and shuck collar" tenancy. The Governor's Message of 1907, recognized this. He said, "I recommend immediate legislation, etc. * * *." "These lessees have a right to know what the future has in store for them." The Legislature responded with the "shall appraise" statute of 1908, and the "shall sell" statute of 1909, with preference right to 160 acre tracts. This "shall sell" has never been repealed.

Legislation respecting public lands is to be construed favorably to the actual settler.

Ard. v. Brandon, 156 U. S. 537, 39 L. Ed. 529.

Wyoming v. U. S., Adv. Op. Sup. Ct. dated May 1, 1921, 65 L. Ed. 453.

and many others.

(29) Now, a thought on the Segregation Statute of 1908, Sess. L. Ch. 49, p. 490.

If this statute gave the power of segregation of any tract which the Commissioners should "whereas we have had offers to place oil bids" on, without any regard to the lessee in possession with preference right to lease or purchase, it was repealed by Session Laws of 1909, saying they "shall sell" * * * "all" lands embraced in Section 33 in that part of the State formerly known as Oklahoma Territory and granted to the State for charitable and penal institutions and public buildings.

If all of the 33, including this one, "shall be" sold as enacted in 1909, how can it be reserved, segregated and diverted to an oil company in 1919, by any pretense whatever, by the Commissioners. Only the "known mineral lands" were reserved by legislation and then only until January 1, 1915 (Sess. L. 1909, p. 490, Sec. 1, Rev. L. 1910, Sec. 7144). The Commissioners by said Act, had no such power to enlarge it to apply to this land.

(30) This Court overlooked the one point decisive of this case. That is, that since it is decided that the Prices had a preference right to re-lease if leased, and to purchase *when* sold, that such preference right was a continuing one, running with the land so to speak, and that he could abide in the security thereof and await either eventuality, knowing that so long as it was leased he was secure in his preference and that whenever sold, if the lessee then had the preference right to buy, he was secure in his preference. That any legislation or construction, or application thereof, that denied or impaired this right violated the Constitution of the United States against impairment of contract, and was unconstitutional and void.

That any legislative construction or application of law that took from him this right, conceded by the opinion to be his, and gave the land to another, relegating him merely to recovery of damage for injury to his "agricultural lease" without regard to his loss of right was and is a taking of his property for private uses without due process or compensation and is unconstitutional and void.

(31) The trial court found all issues of law and fact for defendants, which covered that defendants had preference right to purchase at highest bid. This is the one controlling, important question presented by the case and overlooked by the Court.

The defendants, William T. Price and Ora Price, insisted:

- (1) That they being lessees, had the preference right:
- (a) To re-lease so long as land continued to be leased.
- (b) To purchase, when the State decided to sell.

One or the other of these conditions of fact must always exist: The land (in section 33) could never be in any other state than as land to be leased, or land to be sold. It is unchallenged that Price held this preference right if it had any value, and was capable of being held.

This Court in its opinion said (p. 513):

"The State is bound by the terms of the Constitution and by the terms of the grant to protect him in his preference right to re-lease if the land is re-leased, and the preference right to purchase, at the time of sale, if the land is sold. This is as far as the State is obligated to the lessee without violating the conditions of the grant itself."

This is all Price ever claimed.

But applying that the Court said he was not "entitled to anything with reference to the oil and gas lease in question further than that prescribed by law; any and all damages that he may sustain to his agricultural lease by reason of the operation of the said oil and gas wells."

(32) Now, in this declaration, the Court overlooks the preference right he held either to lease as long as the land was leased, or to buy when sold. The Magnolia was operating on that homestead by one of two rights, either by lease, or by purchase, or without right.

The Court just finished saying he had a preference right to lease or to buy. Yet without showing any extinguishment of this right, *orders* that he was not entitled to anything but damages for injury by the Magnolia, which is nowhere found to have any right. How it arrived there the opinion fails to disclose. Here the Court overlooked the controlling statute.

Enabling Act, Sec. 10, and Law of 1909, p. 448, Sec. 1.

The right claimed was one arising under congressional legislation of Enabling Act and the Constitution of the United States, and was directly presented to the Court and the protection of these instruments directly invoked, and defendants was entitled to have that question and the authorities cited considered and applied.

The Court having gone thus far in words in recognizing defendants' preference right, it goes the other way in deed and denies them everything but damages, and thus denies defendants a right claimed under the Constitution of the United States, the Act of Congress (Enabling Act).

(33) That this cause was assigned for oral argument and submission to only five members of this Court and thereby defendants in error were denied due process of law. Copy of records is hereto attached.

(34) The Legislature of Oklahoma, by Act of April 8, 1908 (Session Laws 484-5):

(a) Extended by law all leases, etc. (not challenged here).

(b) It made it the "duty of the Commissioners * * * to cause an appraisement to be made 'of lands' granted to the State for educational and building purposes." This was done and is known as the "1908 appraisal."

This is important in this case, as often recalled in the briefs.

This legislation was April, 1908, and the Prices bought out a preferred right lessee in the fall of 1908 (Rec. 195, 196, brief 12-13), and the Legislature on March 26th, 1909, passed the "shall sell" law (Sess. L. 1909, 448-9, brief p. 105), imperatively commanded: "Section 4, said lands and improvements thereon *shall be sold under the appraisement of 1908* made and returned to the Commissioners," etc. (Defts. in Error brief, p. 107). Such appraisement was made and approved. Defendants held under this state of the law, and their rights were not subject to impairment by subsequent legislation.

Burke v. So. Pac., 234 U. S. 669.

State ex rel. v. McPeak, 47 N. W. 691,

and other authorities above.

This proposition and controlling authorities were overlooked by this Court.

This is proven by the Court's declaration on page 8 (seven lines from bottom) where it declares it "immaterial what the various legislative acts had been prior to this time, and immaterial as to what regulations may have been promulgated prior to this time." This is contrary to these authorities.

(35) We find then at Statehood, Section 10 of the Enabling Act, preserving to the lessee the "preference right to purchase at the highest bid * * * at the time of such sale" and definitely fixing the rules and regulations for leasing and for appraisement for sale, and requiring the high

bidder in case the lessee does not take the land, to pay for the improvements on the land at the appraised value, and providing that no bid for any tract at less than the appraisement thereof shall be accepted. The whole scheme for the sale of the land is laid out in Section 10. The few small limited powers that were given to the Legislature were in execution of the trust and not in violation of the terms of Section 8 or any other section of the Enabling Act. At any rate, such limited powers were given to the Legislature and not to the Commissioners of the Land Office. The Constitution accepted the terms and limitations of this grant. The Court in this opinion says that it is a compact and that it is the duty of the State to protect the rights of the lessee. But the fault in the opinion is that it is entirely predicated on the false premise that the State had not elected to sell these lands, and that the lessee could not force the State to sell them. This proposition was not in the case; was never argued in the case and is not controlling in the case for the reason that the State has elected to sell the lands but the Commissioners as executive officers of the State have neglected to perform their duties under the law. Let us see about it.

Section 1 of Article 2, Chapter 28, of the Session Laws of 1909, provides:

"The Commissioners of the Land Office *shall dispose of*, sell and convey subject to the limitations, exceptions, conditions, rules, regulations and instructions as provided in the Enabling Act, in this Act or any amendatory act hereof * * * all lands owned by this state * * *,"

known as Indemnity Lands, and also Section 33 in old Territory of Oklahoma. There are no exceptions in this Sales Statute of mineral lands. As evidence of the fact that the Legislature intended to include and sell the mineral lands observe the proviso at the end of Section 1, which the Court overlooked, and which reads as follows:

"Provided further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915."

This is not a reservation of mineral lands from sale, or authority to reserve, but fixed the time of the sale different from the others.

The mandatory character of this statute is intensified by the penal provisions thereof.

Wherefore, defendants in error pray that the Court grant a rehearing herein and that upon rehearing and reconsideration, that this opinion be vacated and set aside, and that the judgment of the lower court be affirmed, as in justice and equity may be due the defendants in error, and for all other and further proper relief.

STUART, SHARP & CRUCE,
STEVENS & RICHARDSON,
BLAKE & BOYS,
Attorneys for Defendants in Error.

Thereafter, at the April, 1922, term of said Supreme Court, on the second day of May, 1922, the following proceeding was had in said cause, to wit:

No. 12,243.

MAGNOLIA PETROLEUM COMPANY

vs.

W. T. PRICE ET AL.

And now on this day it is ordered by the Court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

Thereafter, on May 9, 1922, the following proceeding was had in said cause, in said Supreme Court, to wit:

No. 12,243.

MAGNOLIA PETROLEUM COMPANY

vs.

W. T. PRICE.

And now on this May 9, 1922, it is ordered by the Court that the mandate issued in this cause be recalled and stayed pending appeal to the Supreme Court of the United States.

(Filed in Supreme Court of Oklahoma, July 11, 1922. William M. Franklin, Clerk

In the Supreme Court of the State of Oklahoma.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock Association,

John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly, and W. C. Proctor, Trustees,

STATE OF OKLAHOMA, *ex rel.* Commissioners of the Land Office of the State of Oklahoma, and *ex rel.* S. P. Freeling, Attorney General of the State of Oklahoma, Interveners, Plaintiffs in Error,

vs.

WILLIAM T. PRICE and ORA PRICE, his wife, Defendants in Error.

No. 12,243.

Assignment of Errors.

Come now the defendants in error, William T. Price and Ora Price, and respectfully submit that in the record, proceedings, decision and final decision of the Supreme Court of the State of Oklahoma in the above entitled matter, there is manifest error, and in connection with the petition for writ of error herein makes the following assignment of errors which the defendants in error, William T. Price and Ora Price, aver occurred in the final order and judgment herein, dated the 21st day of March, A. D., 1922, re-hearing denied the 3rd day of May, 1922, as follows, to wit:

I.

That the Court erred in holding that the provisions of the Statutes of Oklahoma, to wit, Act of May 26, 1908, appearing Session Laws 1907-08, page 490, and as in the Revised Laws of the State of Oklahoma, 1910, Ch. 69, Art. 3, page 1938 (effective May 16, 1913), and as amended in the Statutes of the State passed and approved the 3rd day of March, 1917, appearing Sess. Laws 1917, Ch. 253, at page 462 (Senate Bill No. 181), are not in conflict with the provisions of Act of Congress of June 16, 1906 (Enabling Act of Oklahoma), 30 Stat. L. 507, and with the Constitution of the United States, Section 10, Article 1, and Amendment XIV thereto, for that the State of Oklahoma by and through the provisions of said Statute, assumes and seeks to deprive the defendants in error, citizens of the United States and of the State of Oklahoma, of property and of title, and of rights, privileges and immunities secured to citizens of the United States, and of said state,

by the Constitution of the United States, and the Act of Congress of June 16, 1906, and Statute of Oklahoma, Sess. L. 1909, Ch. 28, Art. II; and to deprive the defendants in error, and other citizens of the United States of liberty and property without due process of law; and to deprive and deny the defendants in error and certain citizens and persons within the jurisdiction of the State of Oklahoma of the equal protection of the law; and to impair the contract of lessees, Price and Price.

II.

The Court erred in holding that by the provisions of said Statutes of the State of Oklahoma, Sess. L. of 1907-08, and Sess. L. 1917, these defendants in error are not deprived of property, title, rights, privileges, and immunities, secured to them and other citizens of the United States, and of the State of Oklahoma, by the Federal Constitution, and the laws of the United States, to wit, the Act of June 16, 1906 (Enabling Act of the State of Oklahoma).

III.

The Court erred in holding that by the provisions of said acts of the Legislature of the State of Oklahoma, cited in Assignment II, *supra*, the defendants in error are not deprived of liberty and property without due process of law.

IV.

The Court erred in holding that the said Statute cited in Assignment II, *supra*, and the authority exercised thereunder, and thereby authorized to be exercised thereunder, are within the power of the Legislature of the State of Oklahoma, and not in contravention of the Constitution of the United States, and the Fifth and Fourteenth Amendments thereto, and the Act of Congress of June 16, 1906 (Enabling Act).

V.

The Court erred in holding that the provisions of said Statutes of the State of Oklahoma cited in Assignment II, *supra*, and the authority exercised thereunder and thereby authorized to be exercised thereunder do not unlawfully discriminate between the defendants in error and others similarly situated within the State of Oklahoma.

VI.

The Court erred in holding that the said Statutes of the State of Oklahoma cited in Assignment II, *supra*, do not grant or permit special and exclusive privileges to certain citizens of the State of Oklahoma which they deny to defendants in error, and other citizens of the State similarly situated, and do not permit same to be done, contrary to the Constitution and laws of the United States.

VII.

The Court erred in holding, and in entering the judgment in said cause perpetually enjoining the defendants in error from interfering with the operation of the Magnolia Petroleum Company on the land involved under the mineral lease or grant complained of by defendants in error, and in decreeing the royalties of oil and gas produced under said lease to the State of Oklahoma; and in limiting the recovery of the defendants in error, "To such damages as they may have sustained to their agricultural lease by reason of the operation of said oil and gas lease," for and because by so doing it deprived defendants in error of property without due process of law; and abridged rights of the defendants in error and impaired the contract between the United States and the State of Oklahoma, and of defendants in error in violation of Act of June 16, 1906, and the Constitution of the United States, Art. 1, Section 10, and Amendment XIV.

VIII.

The Court erred in holding and deciding that the defendants in error, William T. Price and Ora Price, had not the preference right to buy said land, in its entirety, under the grant of such right in and to said land so conditioned by the Act of Congress of June 16, 1906 (Enabling Act), and accepted by Constitution of Oklahoma, Article XI, Section 1, and Statute of Oklahoma, Sess. L. 1909, Ch. 28, Art. II, all accepted and asserted by defendants in error, Price.

IX.

The Court erred in holding and deciding that the defendants below, William T. Price and Ora Price, defendants in error, had not the preference right to buy said land, and all thereof, under the contract between the State of Oklahon.

and these lessees expressed in the Constitution of Oklahoma, Article XI, and the Statute of Oklahoma, Session Laws 1909, page 448, being Chap. 28, Art. II, accepted and asserted by defendants as lessees of said land and especially set up and claimed under the Constitution and Laws of the United States.

X.

The Court erred in holding and deciding that as to defendants in error, William T. Price and Ora Price, the Statute of Oklahoma of 1907-08, page 490, Chap. 49, Art. IV, Revised Laws 1910, page 1938, Chap. 69, Art. III, and the Statute of Oklahoma, Session Laws 1917, Chap. 253, page 462, did not impair, contrary to Article I, Section 10, of the Constitution of the United States and the Fourteenth Amendment to said Constitution, the contract between the United States and the lessee, Price, and between the State of Oklahoma and the lessee, Price, expressed in the Act of June 16, 1906, and Oklahoma Constitution, Art. XI, Section 1, and in the Statutes of Oklahoma, Sess. Laws 1909, Chap. 28, Article II, page 448, accepted by Price as lessee.

XI.

The Court erred in holding that the Statutes of Oklahoma cited in Assignment II, *supra*, as construed and applied in this case, to these defendants in error, did not take their liberty and property, and abridge their privileges as citizens of the United States, without due process of law, and in violation of the Constitution of the United States, Amendments V and XIV, and in holding that such legislation as construed and applied to these defendants in error does not take their liberty and property without compensation, and in violation of the Constitution of the United States and Amendments V and XIV thereto.

XII.

That the Court erred in holding and deciding "that the only rights they (defendants in error) had * * * were no more than the preference right to re-lease said land for agricultural purposes." Because, and for the reason, that such holding constitutes a deprivation of defendants' property, and an impairment of defendants' contract with the United States, and

the State, and a denial of equal protection of the law to defendants in error, and the taking of property and liberty of defendants in error, without due process of law, in contravention of the Constitution of the United States, and Amendments thereto.

XIII.

The Court erred in holding that the Commissioners of the Land Office of Oklahoma "duly segregated such land in question from sale because of the oil and gas *supposed* to exist therein" for the reason that such construction and application of the law impairs the contract of defendants in error, and deprives them of their property arbitrarily and without due process of law, and without compensation; for that by the law the defendants held preference right to buy said land and all of it, under and by virtue of the Act of Congress of June 16, 1906, and Constitution of Oklahoma, Art. XI, and the Statute of the State of Oklahoma of March 2, 1900, Sess. L., Ch. 28, Art. II, page 448, and held the preference right to lease and re-lease said land, and to the possession thereof and all of it, pending purchase, and for the reason and because the State of Oklahoma, by its legislation of March 2, 1909, had sold, or ordered sold said land on the terms in legislation expressed, and had caused the same to be appraised long prior to the purported Act of segregation; and the defendants, Price, had done and offered to do all things imposed upon them to do under the law, as found by the trial court to acquire the legal title thereto, and had acquired the equitable title as adjudged by the trial court, and such holding of the court and application to these defendants constituted an impairment of defendants' contract; and deprivation of defendants' liberty and property; and a denial to defendants of equal protection of the law; all in contravention of the Constitution of the United States and Amendments thereto.

XIV.

The Court erred in holding and deciding that the Commissioners "duly segregated such land in question from sale because of the oil and gas *supposed* to exist therein" for the reason and because the Statute of Oklahoma, Sess. Laws 1907-08, Chap. 49, Art. IV, page 490, and Statute of March 30, 1917, Sess. L. 1917, Chap. 253, page 462, or other law, did

these defendants in error, is to impair their contract right in and to said land, and to take their property without due process of law, and to deny them the equal protection of the law; all contrary to the Constitution of the United States and the Amendments thereto, and the Act of Congress of June 16, 1906 (Enabling Act of Oklahoma), and such construction makes said Statutes of 1907-08 and 1917 invalid.

XVI.

The Court erred in holding: "But the State has not sold it and the lessee has not purchased it and until the land is sold and purchased by the lessee and fee simple title conveyed to the lessee, such lessee has no right to the oil and gas and other minerals therein," for the reason that by such decision, construction and application of the State Statutes, the contract of defendants in error, relating to said land is impaired, and their liberty and property is taken without due process of law, and they are denied the equal protection of the law for the reason and because:

(a) By Act of Congress of June 16, 1906 (Enabling Act), and by Sess. L. of Oklahoma 1909, p. 448, Ch. 69, Art. 1, Rev. L. 1910, the lessees were granted a preference right to purchase the land, and all of it, and its content and possession and such grant was accepted by the lessees, defendants in error, and is property and is protected by the Constitution of the United States, Article I, Section 10, and the Fourteenth Amendment; and

(b) Because the State of Oklahoma, by Act of March 2, 1909, page 448, Chap. 26, Art. II, sold, or ordered sold, said land to the lessee thereof; and granted preference rights in and to said land, and all of it, and all its content and possession under the terms in said Statute expressed; and the said grant by the said Legislature was by the said lessee accepted and he performed all on him imposed, and demanded conveyance; and, said decision by its construction and application of the law relating to said land impairs the contract between the lessees (defendants in error) and the United States of America, and the State of Oklahoma, in contravention of the Constitution of the United States and the Amendments thereto, and deprives the lessees of their liberty and property and privileges and immunities under the law, in contravention

not confer plenary power, or authorize segregation of said land on "supposition," and did not authorize the arbitrary and whimsical discrimination practiced against defendants in error; and because the said statutes of Oklahoma did not provide for a hearing to determine whether or not the lands of defendants in error was mineral land or "supposed" to contain mineral within the contemplation of said Statute; and because no notice of hearing on "segregation" of said land was had; and because the law did not authorize the Commissioners of the Land Office of the State of Oklahoma to withhold the land of defendants in error from those ordered sold, or sold by the State by Statute of March 2, 1909, Sess. Laws 1909, p. 448, Chap. 28, Art. II (R. L. 1910, Ch. 69, Art. III), and the said holding and decision is applied to these defendants impaired the contract of defendants in error and deprived them of their liberty and property without due process of law, and without compensation, and denied to defendants in error the equal protection of the law, contrary to the Constitution of the United States and the Amendments thereto, and makes said Statutes of 1907-08 and 1917 invalid.

XV.

The Court erred in holding "the Commissioners of the Land Office could not have acted in good faith to the trust imposed in them by the Constitution and by the Statute, if they had advertised this land *believing* that it contains oil and gas products which would pay a hundredfold more to the State than the sale of land would pay," and by such decision, ruling and construction of the law as applied to these defendants in error, the rights of the defendants in error under the Constitution of the United States, and Act of Congress of June 16, 1906, is impaired, and their liberty and property taken without due process of law, contrary to the Constitution of the United States and the Amendments thereto, because and for the reason:

(a) That the Commissioners of the Land Office of the State of Oklahoma had no *trust* imposed in them by the Act of Congress of June 16, 1906 (Enabling Act), insofar as this land and these defendants in error were concerned.

(b) Their power was not made to depend upon their "believing" something and to so construe and apply the law to

of the Constitution of the United States and Amendments thereto.

XVII

The Court erred in holding that the "contract" of the lessee of said lands, defendants in error, relating to said land and between said lessee and the United States of America, and the State of Oklahoma was, or could be, other than the state of the law governing said lands and applying to said lessee, common with all others similarly situated in said State, and as expressed in the Constitution of the United States and the Act of Congress of June 16, 1906 (Enabling Act), and the Constitution of the State of Oklahoma, accepting the conditions thereof and the legislation of the State of Oklahoma of March 2, 1909, aforesaid; and by such decision, judgment and order, and its application to said lands, and to defendants in error, the Court impaired the contract existing between defendants in error and the State and the United States in relation to said land, and deprived defendants of their liberty and property without due process of law, and without compensation, and denied to defendants the equal protection of the law in contravention of and repugnant to the Constitution of the United States, Section 10, Article I, and Amendment XIV to the said Constitution.

XVIII.

The Court erred in holding that the Statute of Oklahoma, Sess. Laws 1907-08, page 490 (Rev. Laws of Oklahoma of 1910, Chap. 69, Article III, p. 1938, and as amended March 30, 1917, Sess. Laws 1917, Chap. 253, page 462), was not in violation of and repugnant to the Constitution of the United States, Article I, Section 10, and the Fourteenth Amendment thereto, and did not impair the obligation of contract between the defendants below and the State of Oklahoma, and the United States of America, constituted by the Constitution of the United States and the Act of Congress of June 16, 1906 (Enabling Act), and the Constitution of the State of Oklahoma, Article XI; and the Acts of Oklahoma, Session Laws 1909, age 448 (Rev. Laws 1910, Chap. 69, Art. I, Sec. 1, *et seq.*, page 1923), accepted and acted upon by the defendants below, defendants in error here; and in holding that the said Statute of 1907-08 did not take defendants' property without due

process of law, and did not deprive defendants of liberty and property without due process of law, and contrary to the Constitution of the United States and the Fourteenth Amendment thereto.

XIX.

The Court erred in holding, deciding, decreeing and ordering that the defendants in error do not have and hold an equitable title, defensible in law, in and to the said land and did not own and hold an estate in fee therein by virtue of the status in law of said land, and said lessees thereof, and under the Act of Congress of June 16, 1906, and the Rules and Regulations referred to and incorporated therein, and the legislation of the State of Oklahoma thereunder and pursuant thereto, and in not holding that the said estate was equivalent to and amounted to an estate in fee in said land without reversion, and subject only to the change in rate of annual payment by the lessee thereof; and the Court by such decision, judgment and decree, and by the application thereof to these Defendants in Error, impaired the obligation of the contract of Defendants in Error, relating to said lands as expressed in the law aforesaid; and deprived Defendants in Error of liberty and property without due process of law and denied Defendants in Error the equal protection of the law, contrary to the Constitution of the United States and the Fourteenth Amendment thereto.

XX.

That said Statutes of Oklahoma, Sess. L. 1907-08, p. 490, and 1917, p. 462, Ch. 253, and the interpretation placed upon the legislation of the State of Oklahoma aforesaid, and the action of the Commissioners of the Land Office of the State of Oklahoma aforesaid, violates the trust reposed in the State by the Act of June 16, 1906, and diverts the said lands involved herein from the uses and purposes designated by Congress in the said Enabling Act and denies to the Defendants in Error (lessees of said land), their property and rights under the said Act of Congress of June 16, 1906, and is therefore void; because repugnant to the Constitution of the United States and Amendments thereto.

XXI.

The Court erred in rendering and entering the judgment, order and decree herein rendered and entered.

XXII.

The Court erred in denying Defendants in Error rehearing applied for, and in overruling Defendants' in Error motion and application for re-hearing.

XXIII.

The Court erred in holding that the State of Oklahoma, or its Commissioners of the Land Office of Oklahoma, could, or did, regain the estate granted to the lessee by preventing him from performing the conditions subsequent fixed by the law of grant.

Wherefore, these defendants, William T. Price and Ora Price, Defendants in Error in the Supreme Court of the State of Oklahoma, and Petitioners in Error in Writ of Error to the Supreme Court of the United States, pray that a Writ of Error from the Supreme Court of the United States may issue to the Supreme Court of the State of Oklahoma, and further pray that the Supreme Court of the United States will reverse the final order and judgment of the Supreme Court of the State of Oklahoma, and that the defendants, William T. Price and Ora Price, may be restored to all things which they have lost by occasion of said final order and judgment of the Supreme Court of the State of Oklahoma, and that they may have such further and other relief as may be proper and just; for all of which they invoke the protection of the Act of Congress of June 16, 1906, and the acceptance thereof in the Constitution of Oklahoma, and invoke the protection of the Constitution and Laws of the United States and Amendments thereto.

Respectfully submitted,

BLAKE & BOYS,
STUART, SHARP & CRUCE,
W. C. STEVENS,

Attorneys for Defendants in Error.

In the Supreme Court of the State of Oklahoma.

Certificate of Clerk.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing pages, numbered from 1 to 214, is a full, true and complete copy of the petition in error, petition for injunction, amended petition, answer to amended petition, application of State to intervene, petition of intervention, answer to petition of intervention, reply of plaintiff to defendant's answer, reply of intervener to defendant's answer to petition in intervention, recital as to appearances and application and leave of court to file pleadings of the respective parties, the evidence in the case consisting of the stipulation of facts offered in evidence by each party, the rulings of the court thereon, excluding the duplication of exhibits, oral and record evidence, excluding the duplication of exhibits offered, journal entry of judgment, motion for new trial and journal entry overruling same, and journal entry extending the time for making and serving case-made, all the proceedings in the Supreme Court, except the orders concerning the drilling of wells during litigation and the custody of the property pending litigation, and assignment of errors filed, in case number 12,243, Magnolia Petroleum Company, a joint stock association, John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly, and W. C. Proctor, Trustees, State of Oklahoma, ex rel. Commissioners of the Land Office of the State of Oklahoma, and ex rel. S. P. Free-ling, Attorney General of the State of Oklahoma, Plaintiff's in Error, versus William T. Price and Ora Price, Defendants in Error, as the same remain of record and on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 22 day of August, 1922.

Wm M. Franklin

Clerk Supreme Court, Oklahoma.

(Seal)

By Jessie Pardoe

Deputy

Endorsed on cover: File No. 29,096. Oklahoma Supreme Court. Term No. 546. William T. Price and Ora Price, plaintiffs in error, vs. Magnolia Petroleum Company et al. Filed August 15th, 1922. File No. 29,096.

(7868)

OCT 10 1924

WM. H. STANSBURY

Supreme Court of the United States

OCTOBER TERM, 1924

No. ~~103~~ 14

WILLIAM T. PRICE AND ORA PRICE,

Plaintiffs in Error,

VS.

MAGNOLIA PETROLEUM COMPANY, A JOINT STOCK ASSOCIATION; JOHN SEALEY, E. R. BROWN, B. WAYERLY SMITH, E. E. PLUMLY, AND W. C. PROCTOR, TRUSTEES; STATE OF OKLAHOMA, EX REL. COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, AND EX REL. S. P. FREELING, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Defendants in Error.

ORIGINAL BRIEF OF PLAINTIFFS IN ERROR AND RESPONSE TO MOTION TO DISMISS

J. F. SHARP,
C. B. STUART,
M. K. CRUCE,
W. C. STEVENS,
E. E. BLAKE,

Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1923

No.

WILLIAM T. PRICE AND ORA PRICE,

Plaintiffs in Error,

vs.

MAGNOLIA PETROLEUM COMPANY, A JOINT STOCK ASSOCIATION; JOHN SEALEY, E. R. BROWN, R. WAYERLY SMITH, E. E. PLUMLY, AND W. C. PROCTOR, TRUSTEES; STATE OF OKLAHOMA, EX REL. COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, AND EX REL. S. P. FREELING, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Defendants in Error.

ORIGINAL BRIEF OF PLAINTIFFS IN ERROR AND RESPONSE TO MOTION TO DISMISS

Statement of the Case

The Congress, by the Enabling Act for Oklahoma, 34 St. at L. 267 (Act of June 16, 1906), granted the new State in trust for certain purposes, certain lands embraced in Sections 13, 16,

33, and 36 of each Congressional Township, and certain "lieu lands" and certain other lands and moneys (Sec. 7, 8, 9, 10).

The land and the rights thereto, claimed by William T. Price and Ora Price, Petitioners in Error, is a part of Section No. 33, to-wit, the Northeast Quarter (N. E. ¼) of Section Thirty-three (33), Township 1 South, Range 8 West, of the Indian Meridian, in Stephens County, Old Oklahoma Territory. The rights claimed by Mr. and Mrs. Price arise under Section 10 of the Enabling Act, which relates to Section 13 and 33, and which reads as follows:

"University and public institution lands—sales or leases—appraisal of improvements—payment by purchaser. That said sections thirteen and thirty-three aforesaid, if sold may be appraised and sold at public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods of not more than five years, under such rules and regulations as the Legislature shall prescribe, and until such time as the Legislature shall prescribe such rules these and all other lands granted to the State shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the land laws of the United States,

whether surveyed or unsurveyed, but shall be reserved for designated purposes only, and until such time as the Legislature shall prescribe as aforesaid such lands shall be leased under existing rule: Provided, That before any of said land shall be sold, as provided in sections nine and ten of this Act, the said lands and improvements thereon shall be appraised by three disinterested appraisers, who shall be non-residents of the county wherein the land is situated, to be designated as the Legislature of said State shall prescribe, and the said appraisers shall make a true appraisal of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereof at their fair and reasonable value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall, under such rules and regulations as the Legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements and to the State the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract at less than the appraisal thereof shall be accepted." (Italics ours.)

The Prices are within the class of "lessees" of this land, within the meaning of this Act of Congress and as such claim that Congress granted them a *preference right to buy* the said quarter, in preference to all others; a property of value; a specie of "option;" or special privilege; and claim that Congress, by said Section 10, carried over the Lessee's rights under the territorial status includ-

ing a right or re-lease under "existing rules" that was and is a property right. The case has proceeded to this point almost purely as a question of law, there being no controversy of fact, procedure, or instruction. We therefore present the Acts and Statutes involved.

The State of Oklahoma, in its Constitution, accepted this land under the "conditions and limitations" imposed by the Constitution of Oklahoma, Article XI, Sec. 1, reading as follows:

"The State hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act and other Acts of Congress, for the uses and purposes and upon the *conditions*, and under the *limitations* for which the same are granted or donated; and the *faith of the State* is hereby *pledged* to preserve such lands and moneys and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated." (Italics ours.)

And the State authorized the sale thereof, as contemplated by the Enabling Act, in Constitution of Oklahoma, Article XI, Sec. 4, reading as follows:

"All public lands set apart to the State by Congress for charitable, penal, educational, and public building purposes, and all lands taken in lieu thereof, *may be sold* by the State, under such rules and regulations as the Legislature may prescribe, in conformity with the

regulations of the Enabling Act." (Italics ours.)

The First Legislature of Oklahoma, in contemplation of this authority to sell and preparatory thereto, enacted a statute looking to the appraisal of said land as called for by Section 10 of the Enabling Act, *supra*. This State Statute appears herein as Appendix "A," hereby referred to; and is cited as S. L. 1907-8, P. 484, Chap. 49, Art. II, approved April 8, 1909.

This appraisal was made, and as to this particular tract, returned Jan. 12, 1909, (Rec. 98, 100).

The said First Legislature also passed an Act cited as S. L. 1907-8, Chap. 49, Art. III, P. 496, which so far as deemed necessary here, reads in Section 21, page 489, as follows:

"Sec. 21. All preference rights, vested rights and equities shall be inherent rights."

The said First Legislature also passed a Statute, cited as Session Law 1907-8, Art. IV. Chap. 49, P. 490, approved May 26, 1908, which reads as follows:

(APPENDIX "B" ALSO)
An Act.

TO AUTHORIZE the Commissioners of the Land Office to Lease Public Lands for Oil and Gas purposes.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. When any tract of the school and other public lands, granted to the State of Oklahoma under the Act of Congress known as the "Enabling Act" is, by the commissioners of the land office of the State, known to contain oil or gas, or where such lands are, by said commissioners, deemed valuable for oil and gas purposes, such commissioners shall enter of record in their office, their finding, declaring that such oil or gas character exists, and further declaring that the oil and the gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act.

Sec. 2. Each agricultural, timber, grazing or other lease to any surface interest in the deposits segregated, as provided in section one hereof, and further reserve to the State and its lessees and grantees the right to drill and operate oil and gas wells on such premises, and the easement use and

right of way to enter upon and fully enjoy the mining right reserved in this Act.

Sec. 3. The oil and gas interest described in this Act in such lands may be leased by the commissioners of the land office for oil and gas purposes to the same extent and in the same manner as a private owner of lands in fee could, in his own right, execute a grant thereto, subject, however, to the following limitations:

First. For a period not exceeding five years, with suitable provisions for preference right to release for a second term of five (5) years at its expiration, at the maximum rate of rentals, royalties and bonuses that may be obtained therefor, at the time of such renewal.

Second. Upon due advertisement and public notice of not less than thirty days, in such manner as such commissioners may, by rule, prescribe.

Third. Such leasing shall be done under public bids and awarded to the highest responsible bidder; Provided, the commissioners of the land office shall have power to reject any and all bids.

Sec. 4. The lease contract of the State with any lessee for oil and gas purposes, shall stipulate, and the advertisement for bids for leasing such land shall specify a fixed royalty, to be determined by the commissioners of the land office, and

in no event less than 12½ per centum of the total output of such oil and gas, and in addition thereto any bonus offered for such lease, and shall also require a deposit of sufficient earnest money in the hands of such commission as such commission may require to accompany each bid, with appropriate conditions of forfeiture for failure to comply with the terms and conditions of bidding upon such lands. All leases for oil and gas provided in this Act shall contain a provision requiring the lessee to drill a sufficient number of wells upon the leased premises to offset the wells upon adjoining contiguous premises, and a further provision that a failure to faithfully operate the leased premises for oil and gas to as full an extent as individual and corporate premises are being operated within the general oil and gas field where such land is located, shall forfeit such lease to the State. No transfer or assignment of any lease shall be valid or convey any right in the assignee without the consent in writing of the commissioners of the land office. The board of land office commissioners shall require a good and sufficient bond for the faithful performance of said lease and may make such additional rules and regulations covering same as are not specifically provided for in this Act.

Sec. 5. No lease shall be executed to, or in the interest of any pipe line or transportation company, or any company allied to, or confederated therewith or any subsidiary company thereof, nor any other company, corporation, person or association under the control of either or all of them, nor to any stockholder, officer, director, agent, representative or employee, acting singly or as firms or corporations of such company, or either of them. Leases executed under the terms of this Act shall stipulate that, for any refinery or crude oils and its products and by-products, owned, operated or controlled by the State, the State shall have the preference right to purchase and receive the output of such oil and gas lease at the market price thereof; Provided, nothing in this Act shall prevent the lessee from selling the output of said leases to any person, firm or corporation whatsoever until notice in writing from the commissioners of the land office shall be served on the lessee that the State is ready to take such oil and gas, or either of them, and all sales of oil and gas under this proviso shall be valid and binding.

Sec. 6. Any person, firm or corporation leasing under the provisions of this Act, and operating for oil and gas, shall be liable to the surface owner, the lessee or purchaser, for all damages or loss ac-

cruing to the surface interest in said land and to all crops and improvements thereupon and appurtenances and hereditaments thereunto belonging, whether said land be agricultural, timber, grazing or otherwise.

Sec. 7. Should the lessee or owner of the surface interest and the lessee of the oil and gas interest specified in this Act be unable to agree upon the damage and loss sustained by such surface lessee or owner by such lessee of the oil and gas interests therein, may condemn the same for such purpose under the law of eminent domain to like extent and in the same manner and upon the same procedure and remedies as is provided for the assessment of damages and compensation to the owner of the fee in case of condemnation for railway purposes.

Sec. 8. The commissioners of the land office shall have plenary power and authority to enter their finding of record in their office, modifying, altering or vacating any order, finding, or entry, and when any tract or parcel of land shall be proven to be valueless for oil and gas purposes, or such tract of land or the oil and gas field in which the same is situated shall become impoverished and exhausted, then such commissioners shall enter of record of their finding of such non-oil and gas

bearing character, or of such exhausted or valueless condition for such oil and gas purposes, and when so entered of record by such commissioners, the oil and gas character of such land shall conclusively terminate. Upon premises leased for oil and gas purposes, no finding or other entry of record shall be made, modifying, altering or vacating any order, finding or entry, previously made until notice of not less than ten days shall be given by registered mail to the last known address of such lessee, or by posting notice in writing in a conspicuous place upon the premises vacated by such new finding, order or entry.

Sec. 9. The proceeds derived in bonuses and royalties and from other inducements and considerations for the execution and operation of the oil and gas leases in this Act provided, shall be carried into the several funds, for the use and benefit of which such lands were granted to the United States to the State of Oklahoma, and to the territory now comprising the area embraced within the said State under the provisions of the Enabling Act, and any and all other Acts of Congress, for the uses and purposes, and upon the conditions and under the limitations for which the same were granted, and the money resulting from such lease and

from the operation thereof shall be handled, disposed of and used in like manner as the other moneys belonging to said several funds under the laws of this State.

Sec. 10. All Acts and parts of Acts, rules and regulations, as well as the alterable provisions of the schedule of the Constitution of the State, in conflict herewith, are modified, amended and repealed to conform hereto.

Sec. 11. An emergency is hereby declared, by reason whereof it is necessary, for the immediate preservation of the public peace and safety, that this Act take effect from and after its passage and approval.

Approved May 26, 1908.

(It also appears herein as Appendix "B", and is usually referred to as the "deem" Statute, or "segregation" Statute.)

This Statute is challenged as being repugnant to the Enabling Act, Sec. 10, *supra*, and repugnant to the Constitution of the United States, Art. 1, Sec. 10; particularly as construed, or applied, to petitioners and this tract of land as denying Petitioners the right to buy granted by Sec. 10 of the Enabling Act; as impairing petitioners contract right to buy this particular tract offered and tendered them by the Enabling Act, Sec. 10, *supra*, and

accepted by them, as evidenced by their purchasing a lessee's rights and improvements, long established, and by becoming lessees themselves: that it is repugnant to the Constitution of the United States, as depriving petitioners of property and liberty without due process of law, contrary to Amendment V of the Constitution of the United States, and as taking petitioner's private property for public use without just compensation; contrary to Article V of the Constitution of the United States, and as abridging the privileges and immunities of them, the petitioners, citizens of the United States, and, as depriving them of liberty and property without due process of law; and as denying them, particularly, the equal protection of the laws accorded to others in similar circumstances, all contrary to the Amendment XIV of the Constitution of the United States.

The petitioners were defendants below, and in their answer and arguments, briefs and pleas, urged these points and questions as defense, and affirmatively claimed these rights, and protection of the Courts of the United States; and the Supreme Court of the State of Oklahoma, being the highest court in said State in which hearing could be had, denied same, and held in effect that the lessees took no en-

forceable or defensible right by the Enabling Act, Sec. 10; that the State could do as it pleased with the land and its contents, so long as the lessees were paid for "damages to their agricultural lease"; which was equivalent to saying they took nothing by the Enabling Act, and other Acts of Congress, and Statutes and Constitution of the State, for the Constitution of the United States to protect.

The Second Legislature of Oklahoma passed a Statute, approved March 2, 1909, cited as Session Law 1909, Chap. 28, Art. II, at P. 448, (appearing herein as Appendix "C") which specifically provided for sale of Section 33. For present attention, we quote and re-cite as follows:

"Sec. 1. The Commissioners, * * * shall dispose of, sell and convey, subject to such limitations, exceptions and conditions, rules, regulations, and instructions as provided in the Enabling Act, in this Act, or any Act amendatory hereof, * * * all the following lands (describing them); also the lands embraced in Section 33 in that part of the State known as the Oklahoma Territory, and granted to the State for charitable, and penal institutions and public buildings, etc. * * *

"Provided, further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said land shall not be sold prior to Jan 1st, 1915." (Italics ours.)

“Sec. 3 (b) (on page 451) provided, *inter-alia*,—

“Any lessee holding a lease on any of the lands described in Sec. 1 of this Art., except New College lands, shall have the preference right to purchase one hundred and sixty (160) acres so leased at the highest bid at the time of the sale, as hereinafter provided in this bill.” (This is not New College Land as provided for in Sec. 12, Enabling Act.)

“Sec. 4. Said lands and improvements thereon shall be sold under the appraisalment of the year 1908, made and returned to the Commissioners of the Land Office * * * (This appraisalment made under appendix “A”).

Section 7 provided that if the lessee failed to pay the highest bid, then the purchaser was to pay him, or for him, the appraised value of the improvements.

Section 8 provided for payment for lands in “forty (40) equal annual payments,” and for issuance of “certificates of purchase,” etc.

Section 10 provided that “all purchasers, lessees or holders of any of the public lands of this State shall take the same, subject to the conditions of this Act,” etc.

Section 11 provided that “all lands shall be sold at public auction at the door of the County Court House” where land situated, etc., (In this case, Stephens County); and, “Provided, that if no bid

shall be made, the lessee may take said land at the *appraised value.*”

Section 15 provides:

“All the lands not leased, described and enumerated in section 1 of this act, shall be opened for sale immediately upon the appraisement of the same as provided in this act and by law, and all of said lands offered for sale under the provisions of this act that are leased shall be sold upon the expiration of each lease contract, or sooner upon petition of lessee to the Commissioners of the Land Office, asking for sale of any of said lands so leased.”

Section 17, generally, made any violation of the Act by the Commissioners of agents a “felony” with imprisonment from three to ten years, and disqualification from holding office.

This Statute was mandatory in its terms as to sale, times, conditions and duties of the officers; left no discretion in them, or room for anything but obedience or disobedience.

The defendants, Prices, claimed that this Statute was within the authority of the Legislature by and under the Enabling Act, Section 10, and by the Oklahoma Constitution, Article XI, Sec. 4. This has never been challenged.

They further claim under this Statute:

I. That this was imperative legislation com-

manding the sale of said lands (here Northeast Quarter of Section 33) as the expiration of the last running lease period would be January 1, 1909; (Rec. 48, 49) (so it took immediate effect as to this land); or, at least, at termination, January 1, 1910, of the Executive extension made May 12, 1909, shortly after the passage of Appendix "C" (Rec. 50-51, Exhibit "E") See. 15, *supra*.

II. That it granted Price, as a lessee, a preference right of purchase of the "land",—all of it, and all incidents of ownership.

III. That being subsequent to Appendix "B" no other power then lay in the Commissioners, than to carry out this Statute, of sale.

IV. That any failure to do so could not defeat Price's rights, or the protection thereof, under appendix "C", without violating U. S. Constitution.

V. That this Statute both recognized the preference rights granted by the Enabling Act, and, *for the State*, granted a preference right of purchase of the land (See Sec. 3 (b), *supra*), and at the appraised value if no bids made therefor; (Sec. 11, *supra*; also Appendix "C").

VI. That this Statute constituted a legislative offer, or proffer to the lessees, and when ac-

cepted, and relied upon, constituted a contract protected by the Constitution of the United States, Article I, Sec. 10, against impairment by the State or any authority under it.

(The land was held by a lessee, under previous legislation, rules and regulations, deraigning title and possession since 1902, (Rec. 42 to 50); Price contracted to buy his possession, status, preference under the Enabling Act, improvements and rights in the fall of 1908, (Rec. 154); and made final payment and took assignment in October, 1909, (Rec. 51-52) paying \$2050.00 therefor; this was after this last above referred to Statute ("C") was passed. He therefore accepted, took under, and relied upon this legislation and continued in possession thereunder, always asserting his right and title.)

VII. The defendants below, (Mr. and Mrs. Price), claimed, and as petitioners, now claim that this Statute had the effect, first, of repealing the Statute of May 26, 1908, *supra*, (Appendix "B"), even if same were constitutional, as to all lands covered by this Statute, (Appendix "C"), and ordered sold, including the land here involved, because these two Statutes, Appendices "B" and "C" could not co-exist.

VIII. Of constituting a proffer by the State to the lessee of the purchase of the land held by him under the terms and conditions in said Statute, under rule of *Burton v. Traver*, 130 U. S. 232; and that he could confidently become, or remain a lessee relying thereon for the ultimate acquirement of title to said land, and all of it, and all of its contents, in fee, with full rights of sovereignty and exclusive enjoyment; and which the State could not, under Dartmouth College case, and authorities therein cited, take away.

IX. That they had taken under said Statute and Enabling Act, and Constitution of Oklahoma and the Constitution of the United States, from one whose rights were vested and fixed under former Legislation, both Federal and Territorial, and the rules and regulations and decisions relating thereto; and thereby established a contractual relation with the United States, and State, to use, improve and acquire and enjoy said land, which was a contract protected by the Constitution of the United States, Article 1, Sec. 10, and the Amendments V and XIV; and under the rule of *Pennoy v. McCaughy*, 140 U. S. 1.

The status of Price, as lessee, and of his predecessors in title, and this legislation, is not ques-

tioned, and the point at issue arises from the proceedings following, under which plaintiff, Magnolia Petroleum Company, and the State, defendants in error, here claim.

The Commissioners of the Land Office of Oklahoma held a sale of the lands in Stephens County, Oklahoma, (in which this land is situated) as is set out and cited in detail hereinafter under caption, "Facts Under the Statutes." P. 24.

At this sale, January 11, 1911, Price appeared and offered to take the land at appraisal. The Trial Court found he did all the law required of him, and found all facts and law for him, (Rec. 155, finding 13, and finding 8). Price claims that then and there he bought the land and acquired legal and equitable estate therein, and that he could not be defeated of his right by any act of omission or commission, by the Commissioners or other agents or officers of the State under rule of *Lytle v. Arkansas*, 9 How. 333; 13 L. Ed. 153, and cases, *post, infra*, (p. ²⁷~~34~~).

In this state of affairs, the Commissioners of the Land Office of Oklahoma, on August 26, 1915, passed a resolution found in Record on page 80, as Exhibit "C". By this it is contended by the Defendants in Error that the Commissioners withdrew

this land from the Prices' claim of purchase in 1911; and from preference right under the Territorial rules and regulations carried over by Enabling Act and preserved by the constitution of Oklahoma; and from preference right under the Enabling Act, Sec. 10, *supra*; and from preference and other rights to buy, and duty to sell under the Statute, abstracted above (Appendix "C" herein); and from any and all other rights Prices might claim.

They can claim this right to segregate and withdraw from effect of all laws, only by virtue of the "deem" Statute quoted above, and appearing herein as Appendix "B".

It has not been otherwise contended.

Subsequent thereto, and in October, 1915, the Commissioners sold an "oil lease" on said land for $\frac{1}{8}$ royalty and \$165.25 "bonus" (Rec. 82), but this lease was relinquished voluntarily on January 3, 1918, (Rec. 85). No action was taken after this by the Commissioners as to this land, other than to issue the alleged "oil and gas" lease to the plaintiff, Magnolia Petroleum Company on January 4, 1919 (Rec. 14, Exhibit "A"), involved herein.

When the Magnolia Petroleum Company essayed to enter under this "lease", Price, in possession, resisted. The District Court enjoined Price

in this suit, and being thus tied, he yielded to constituted authority, and the Magnolia Petroleum Company entered on and drilled the land, located a supply depot thereon, destroyed the use and fences, and improvements, except the buildings, and made the farm uninhabitable, all as more fully appears herein.

Statement of Specific Facts.

This action involved adverse claims to the Northeast Quarter (NE $\frac{1}{4}$) of Section 33, Township 1 South, of Range 8 West of the Indian Meridian, Stephens County, Oklahoma. It was granted to Oklahoma by Enabling Act (34 St. at L. 267). The defendant Price was the last of a chain of lessees of said land, which chain began shortly after the opening of the Kiowa, Comanche and Apache Country to settlement in 1901, under 31 St. at L. 680. By that Act this land was reserved from settlement. The first term ran from June 8, 1902, to January 1, 1905, (Rec. 42). The next term ran to January, 1908, (Rec. 45); the next term ran by legislative extension to January 1, 1909, (Rec. 48-9, Exh. C); by authorized executive order it was extended to December 31, 1909. (Rec. 50-1, Exh. E).

The defendant Price bought out a prior lessee's possession, improvements and rights, in the fall of 1908, (Rec. 154), and took an assignment on final payment in October, 1909, (Rec. 51-52, Ex. F' and Rec. 96) paying \$2050.00 for the then lessee's rights. Price's title, possession and status, as lessee, has not been questioned, and the case was tried on the theory that whatever rights a lessee could have in said land he had, and that the case was desired to determine the substantive rights, under Enabling Act.

The plaintiff, Magnolia Petroleum Company, claims under an alleged "oil and gas lease" executed by the Commissioner of the Oklahoma Land Office on January 4, 1919. (Rec. 14.)

When the Magnolia Petroleum Company attempted to enter upon this land for the exploration of oil and gas, the defendant, William T. Price, being in possession, and in good standing and fully paid up, refused entry and the Magnolia Petroleum brought this action May 25, 1920, to enjoin the defendant, Price, from keeping it off the land. A restraining order was issued by the District Court of that county against Price. The Magnolia Petroleum Company, under this protection, entered upon and developed the land, drilling many wells and

destroying much of Price's improvements, and taking possession of most of this land and destroying the use of the remainder.

Price's improvements consisted of a farm house, barns, fences, wells, an apple orchard of six hundred trees, etc., etc., valued by state appraisers on January 12, 1909, at \$1290.00; land at \$3000.00, (Rec. 98-100). On August 26, 1915, the Commissioners of the Land Office of Oklahoma declared said land "valuable for mineral purposes and that the same be segregated and withheld from sale," (Rec. 80), and on January 4, 1919, executed this lease to the Magnolia Petroleum Company. This action of the Board is challenged as violating Price's rights under the Constitution of the United States and the Enabling Act, 34 St. at L. 267, Sec. 10.

Statement of Fact Under the Statutes.

Conformable to the statutes (Appendix "A") the land was appraised in January, 1909, (Rec. 98). No "deeming" of value for oil and gas purposes was made and declared by the Commissioner of the Land Office as to this land, between passage of the "deeming" statute, (Appendix "B") on May 26, 1908, and the passage of the sale law, (Appendix

“C”), on March 2, 1909. No “deeming” declaration was made until August 26, 1915. (Rec. 80.) At this time Price contends that the “deeming” law of 1908, (Appendix “B”) was

1st. Repealed, by the sale law, (Appendix “C”)

2nd. If existent, was

- (a) Repugnant to the Enabling Act, Sec. 10.
- (b) Repugnant to the Constitution of the United States as impairing his contract and the rights arising under the Enabling Act and the Sale Statute (Appendix “C”).

Under the Sale Statute, (Appendix “C”), the Commissioners caused all the lands in Stephens County District (of 5 counties) to be appraised, and held an auction at Stephens County Court House on January 11, 1911, and thereat the other three quarters of this Section No. 33, were sold, and all of the adjoining Section 34, lieu land, was sold at appraisal (Rec. 117-8, par. “nine”) and all the lands granted by the Enabling Act, in said county to except the quarter in question and one other, was sold; all at appraisal and all to lessees; and approximately the same ratio of sales was had in all adjoining counties in the same sales district; that at that sale Price

appeared and insisted that this land be sold to him and offered to take it at appraisal, thereby complying with law and acquiring equitable title (Rec. p. ¹⁶⁵ §). It was so found by the Trial Court, (Rec. 155, finding 8) ^{and 10}. There was no other bid thereon; that the land was not *known* to be of value for oil and gas purposes until 1920, and after this suit was instituted and it was so found by the Court, (Rec. 155, finding 11); that the Trial Court found all issues of law and fact in favor of Price, defendant, (Rec. 155, finding 13); that Price was a qualified "lessee" under the Enabling Act, and had complied with the Sale Law of 1909, (Appendix "C") and earned his title to said land and that he held: (1) such a right under the Enabling Act to preference of purchase of the land, and all of it, as could not be taken or impaired by the State or Commissioners, by the attempted "deeming" of value for oil and gas purposes made August 26, 1915, under the Statute, (Appendix "B"); (2) Such a right of purchase under the Enabling Act, and the Sales Law (Apx. "C") as could not be subsequently taken from him by the State in part or whole, acting by Statute (Appendix "B"), or otherwise; (3) That the alleged oil and gas lease, under which the Magnolia Petroleum Company claimed, was unauthorized, illegal and void as to Price and this land; that the

Magnolia was a trespasser *ab initio*, and liable in accounting to Price for damages done and oil and gas taken, following *Guffy v. Smith*, 237 U. S. 101. (For trespass after notice, see 237 U. S. 118-119.) (Decree, Rec. 152-159.)

That the Supreme Court of Oklahoma reversed this judgment holding in effect that the state took the land with power to do with it as it pleased, so long as its oil lessee paid the original lessee, Price, his "damages sustained to his agricultural lease by reason of the operation of wells," and that he could not interfere, with the "oil lessee" (Rec. 186), and that Price had no rights other than a temporary occupant, without right, or term, would have.

Questions Presented.

This record presents then, clearly and unequivocally, and it is the desire of all parties so to do, the questions—

1st. As to what right, if any, was granted by the Enabling Act, Section 10, to the lessee holding the lands granted by that Act to the State, by his "preference right of purchase."

2nd. Were the rights so granted such rights as, when accepted and relied upon by the lessee, could not be impaired, taken or avoided by the

State, as by its Legislation, (Appendix "B" herein) without violating the Constitution of the United States?

3rd. Were the rights granted to Price, lessee, by the Sale Statute, (Appendix "C"), such rights as, when accepted and relied upon by him, could not be subsequently impaired by the State, or its Commissioners acting under the authority of the State, and particularly by their "deeming" the land valuable for oil and gas purposes, (Under, Appendix "B") on August 26, 1915, without violating the Enabling Act and the Constitution of the United States?

4th. Were the rights held by Price, as lessee, under the Enabling Act and the Sales Statute, (Appendix "C"), and the Constitution of the United States such rights as could not be impaired, avoided or taken by the State as by Statute (Appendix "B"), and the authority exercised by the Commissioners, thereunder, in executing the oil and gas lease to the Magnolia Company, January 4, 1919, without violating as to Price, the Constitution of the United States?

5th. Summarizing, was the act of the Legislature of 1908, (Appendix "B") constitutional as to

Price, and this particular land, and were the proceedings of the Commissioners thereunder,—

(a) in "segregating" this land by their "deeming" resolution on August 26, 1915, and

(b) in leasing it for oil and gas purposes on January 4, 1919, (while held and possessed by Price under the Enabling Act and Sale Statute of 1909 (Appendix "C")) constitutional?

Contention of Parties.

The plaintiff, Magnolia Company, Trustees, contends that the State took said lands as patentee with "plenary power" over it to do with it as it pleased; that the State, and its Commissioners could divide the land, both as to use and elements, leasing the surface to one, the contents to another; could sell the minerals therein separate from, and dominant of the surface interest and lessee, and that the preference right of purchase in the lessee, by the Enabling Act, if any, extended only to the relief after the State and mineral lessee was satisfied to let it go.

The defendant, Price, contends that the Enabling Act, Section 10, gave the State only limited authority over said land, such authority being

- 1st. To hold it as a trust estate, or
- 2nd. To sell it as a trust estate,

Errien, Commissioner v. U. S., 251 U.
S. 41; 64 L. Ed. 128,

Betts v. Commissioners, 27 Okla. 64.

That if the State elected to hold the land and lease it, the land could be leased,

- 1st. For "periods" *not exceeding* five years;

- 2nd. Under "*existing rules and regulations*"
(which appear in Rec. at 133-134 with
letter of Governor Steele, 129-133),

until the Legislature presented new rules, Enabling
Act, Sec. 10, which it did not do; or,

- 3rd. That the State may sell said land

- (a) Under such rules and regulations
as the *Legislature* may prescribe.

- (b) Preference right to purchase at
the highest bid being given to the
lessee. (Enabling Act, Section 10).

The effect of this last clause engenders this litigation. The defendant claimed that under the Enabling Act, Section 10:

- 1st. A preference right of lease and release
that insured him secure tenure and ex-
clusive possession so long as the State
elected to lease, and not to sell.

- 2nd. That under the Enabling Act he had always a preference right of purchase of said land and all of it, both before the State's election to sell, and afterwards, but, of course, only enforceable after the State's election to sell. (Appendix "C").
- 3rd. That such preference right gave him the right to hold the land intact, free from all trespass, or disintegration, until he could exercise the option given him by Congress in the Enabling Act, Sec. 10.
- 4th. That the State, by the Sale Statute of 1909, (Appendix "C") elected to sell said land, fixing all the terms and conditions of sale, and the congressional grant of preference, and regranted to the lessee the option of preference right of purchase of the land, and all of it, (Sec. 3 b.)
- 5th. That defendant lessee accepted and relied on said preference right expressed in the law, and defendant claims that thereby such a grant contract right arose as to said lessee, and as to said land, as could not be impaired, taken, or denied by the State, except by violating the Constitution of the United States, Article 1, Section 10, and the V and XIV Amendments thereto.
- 6th. That the State Statutes (Appendix "B") in so far as it took, or purported to authorize the taking, from Plaintiffs in Error of the right granted by Enabling Act, or by Statute (Appendix "C"), to

buy the whole of said land, was a violation of Constitution of the United States, and the XIV amendment thereto.

Before entering upon a discussion of the legal questions arising in the Record, we shall consider briefly the question of law raised by the motion to dismiss for want of jurisdiction, made by defendants in error. Plaintiff and Intervenor, the State, (Defendants in Error), move to dismiss for substantial reasons not on account of any error of omission or commission; so the case is thereby presented on its merits, and the Jurisdiction of this Court.

Assignment of Errors

To boil down our rather extended assignments of Error (Rec. 204-213), and state them briefly, we allege that the Court erred:

1st. In reversing the judgment and decree of the District Court of Stephens County, Oklahoma, on the findings made, and unreversed.

2nd. In holding that the Statute (Appendix "B") was not repugnant to the Enabling Act and Constitution of the United States, as to Price.

3rd. In holding that Price held no preference right of purchase of the land, and all of it, by virtue of the Enabling Act (34 St. at L. 267, Sec. 10), and by virtue of the Sales Statute (Appendix "C"), that was protected by Constitution of United States.

4th. In holding that defendant, Price, had no rights except to "damage for injury to his agricultural lease by reason of the operation of the Oil Wells," thereby denying Price all right to buy the land.

5th. In holding that the oil lease, (Rec. 14) was valid to the Magnolia Petroleum Company, effective, and authorized by law.

6th. In holding that Price had not acquired an equitable estate and title to said land by virtue of the Statute, (Appendix "C"), and his compliance therewith as found by the Trial Court, (Rec. 155, finding 10, et al.)

Answer to Motion to Dismiss Writ of Error.

That the case is one of the class named in Paragraph 237 of the Judicial Code, as amended by the Act of September 6, 1916, Chap. 448, Par. 2, providing that this Court may re examine and reverse or affirm the judgment of the highest court of a state, upon a writ of error, there being drawn in question the validity of a Statute, or an authority exercised under any state, on the ground of their being repugnant to the Constitution or laws of the United States, the decision of the highest Court of State being in favor of the validity of such Statues, or authority, seems to us to be beyond all reasonable controversy.

The right of the plaintiff in error, William T. Price, with whom is joined his wife, Ora Price, arises out of, and, we think, is protected by Section 10 of the Enabling Act. (34 Stat. at L. 267.)

This right, according to the contention of plaintiffs in error, was denied, impaired, and in effect, destroyed by the Acts of the Legislature of the State of Oklahoma complained of, and by the authority exercised under the State by the Commissioners of the Land Office, in executing an oil and gas lease to defendant in error, Magnolia Petroleum Company, on the lands previously leased and

occupied by Price, and which were ordered sold by the mandatory Act of the State Legislature, (Sess. Laws of Oklahoma, 1909, App. "C"), pursuant to the authority granted in Sec. 10 of the Enabling Act, and Constitution of Oklahoma, Art. 11, Sec. 4.

It is the contention of plaintiffs in error,—and has been from the inception of this litigation,—that the State Statutes, Appendix "B," and the authority exercised under the State, by which it was sought to create two estates in leased, public lands,—namely, one to the oil and gas, if any, in the lands, and the other to the soil and growth thereon, as well as to minerals other than oil and gas,—were repugnant to the terms of the grant, and to the rights of the lessees to purchase the land, and all of it,—except as to "*known*" mineral lands—meaning thereby, all that lay beneath the soil, as well as all that was on the surface, when sold by the State.

This conception of the rights of such lessees is, of course, in conflict with the claims of the defendants in error, who contend in effect that the lessees were given only a preference right to purchase the surface of the land, whether of "*known*" or "*unknown*" mineral value and that by virtue of

State legislation and of the authority exercised under the State, the latter had the right to lease, and the Magnolia Petroleum Company had the right to acquire the oil and gas underneath the leased premises, although not "known" to be of mineral value.

The case presents, therefore, the clear-cut issue as to whether the State Statute, and the authority exercised under the State, conflict with the preference right to purchase this land and its contents, when sold by the State.

A reasonable construction of the provisions of the Enabling Act, we think, must lead to the conclusion that when the land was ordered sold by the legislature of the State, the preference right to purchase, at the highest bid, being given by the Enabling Act, and by state legislation, to the lessee at the time of such sale, it was intended to, and did, in fact, confer on such lessee the indestructible right to purchase the fee to all of the land not known to be valuable for minerals, and that also, after Jan. 1st, 1915, and by him theretofore leased; and not merely a limited estate therein.

Consistently throughout the progress of the case, defendants below (plaintiffs in error here) set up their rights, under the Enabling Act, and urged

that the Act of the State Legislature of Oklahoma, (Appendix "B") and of the authority exercised under the State, (Rec. 80) were in conflict with the terms of the Enabling Act, and with the rights vouchsafed them under the Federal Constitution.

These contentions were set up repeatedly, and at length, in their answer; were recognized in the petition of intervention by the State of Oklahoma; were considered and upheld by the trial court; and denied in the opinion of the State Supreme Court; were again urged in the defendant's petition for rehearing, and were set out in the assignments of error and the petition for writ of error to the Supreme Court of the United States. Believing at the outset of the litigation that Federal questions were involved, defendants, with undue prolixity, perhaps, were careful to urge, at each step of the litigation, their rights under the Federal Constitution and the Enabling Act.

That the case does involve Federal questions,—or at least, a Federal question,—and that this Court has jurisdiction to re-examine and reverse or affirm the Supreme Court upon a writ of error,—a petition for writ of *certiorari* having heretofore been denied in case No....., on the docket of this Court,—is, we think, clearly shown.

We are, of course, dealing now with the question of jurisdiction of this Court, and not with the propositions of law that are discussed elsewhere herein.

It is with much hesitation that we undertake to discuss in this Court questions pertaining to the Court's jurisdiction, knowing full well our inability to add a single thought to what has been so often, and so very clearly and fully stated in the many opinions passing upon the question of the court's jurisdiction, and, of recent years, by writ of error in certain classes of cases, and by *certiorari* in other classes, as provided in Section 237 of the Judicial Code, and as amended February 17, 1922.

We shall, however, take the liberty of citing and quoting from a few opinions of the Court,— principally, recent ones since the amendment of September 6, 1916,— as bearing upon, or determining the question of the Court's jurisdiction of the instant case.

In *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331, it was said that the counter-claim of defendants depended on the effect of the grant from the United States to Shively of land bounded by the Columbia River, and of the conveyance from Shively to defendant, as against the deeds from the State

to the plaintiff. The only matter adjudged was upon the counter-claim. The judgment against the validity of defendant's claim proceeded upon the ground that the grant from the United States, upon which it was founded, passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This, it was held, was a direct adjudication against the validity of a right, or privilege claimed under a law of the United States, and presented a Federal question within the appellate jurisdiction of this Court. Furthermore, it was said that jurisdiction has repeatedly been exercised by the Court, without objection or doubt, in similar cases, of writs of error to the State Courts,—citing cases.

The opinion in the *Shively* case has since been cited as authority, in *Hardin v. Shedd*, 190 U. S. 508, 47, L. Ed. 1156; and in *Ferris v. Frohman*, 223 U. S. 424, 56 L. Ed. 492.

In taking up a few of the recent opinions of this Court,—all of which were decided since September 6, 1916, and which involve either a construction or application of the Judicial Code,—we cite the following:

Darling v. Newport News, 249 U. S. 540,
63 L. Ed. 759;

Yazoo & Mississippi Valley R. Co. v. Mullins, 249 U. S. 531, 53 L. Ed. 754;
New Orleans & Northeastern R. Co. v. Scarlet, 249 U. S. 528; 63 L. Ed. 752;
Mackey Tel. & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. Ed. 863;
Kenney v. Loyal Order of Moose, 252 U. S. 411, 64 L. Ed. 638;
Merchants' Nat'l Bank v. City of Richmond, 256 U. S. 635; 65 L. Ed. 1135;
Kansas City So. R. Co. v. Road Improvement District No. 6, 265 U. S. 658, 65 L. Ed. 1151;
Lake Erie Western R. Co. v. State Public Utilities Commission, 249 U. S. 422, 63 L. Ed. 684;
Tinjar v. Corrigan, 259 U. S. 212, 66 L. Ed. 254.

In *Darling v. Newport News*, 249 U. S. 540, 63 L. Ed. 759, first above cited, it was held that a judgment of the highest Court of a State, which affirmed the dismissal below of the bill in a suit to enjoin a municipality from discharging its sewage in such a way as to pollute and ruin plaintiff's oysters, upon his beds under the tidal waters, is reviewable in the Federal Supreme Court, where the bill alleges that if the applicable State Statutes purport to authorize destruction of plaintiff's oysters they are contrary to the Constitution of the United States, and especially, the Fourteenth Amendment, and in the assignments of errors to the highest State Court the Statutes are said also to violate the contract clause of such Constitution.

In *Yazoo & Mississippi Valley R. Co. v. Mullins*, 249 U. S. 531, 53 L. Ed. 754, it was held that a question as to a conflict between State and Federal Statutes is one which, when denied by a Court in favor of the State Statute, will sustain a writ of error from the Federal Supreme Court to the State Court.

In *New Orleans & Northeastern R. Co. v. Scarlet*, 249 U. S. 528, 63 L. Ed. 752, it was held that a writ of error, not *certiorari*, is the proper method of reviewing in the Federal Supreme Court a judgment of the highest Court of a State, in a case in which the conflict of a State Statute with a valid law of the United States was involved, and the decision was in favor of the validity of the State Statute.

In *Mackey Tel. & Cable Co. v. Little Rock*, 250 U. S. 94, 63 L. Ed. 863, this Court held that a decision of the highest Court of a State, adverse to the contention that the taxing provision of a telegraph franchise ordinance as construed and applied, has the effect of depriving the Telegraph Company of rights secured to it by the Constitution and the laws of the United States, is reviewable in the Federal Supreme Court, by writ of error.

In *Kenney v. Legal Order of Moose*, 252 U. S. 411, 64 L. Ed. 638, it was held that a writ of error,

not *certiorari*, is the proper mode of reviewing in the Federal Supreme Court, a judgment of the highest Court of the State, upholding a State Statute, challenged as repugnant to the Federal Constitution.

In *Merchants' National Bank v. City of Richmond*, 256 U. S. 635, 65 L. Ed. 1135, it was held that a writ of error, not *certiorari*, was the proper method of reviewing in the Federal Supreme Court, a judgment of the highest Court of a State, in a suit in which the defeated party below drew in question the validity of a municipal ordinance, and the Statute sanctioning it, as construed and applied, upon the ground of their alleged repugnance to a Federal Statute, and the State Court sustained their validity notwithstanding such contention.

In *Kansas City So. R. Co. v. Road Improvement District No. 6*, 256 U. S. 658, 65 L. Ed. 1151, it was held that the validity of a State Statute, under the Federal Constitution, having been adequately challenged in the State Courts, the case may be brought up to the Federal Supreme Court by writ of error, and *certiorari* will be denied. There it was maintained by petitioners that the assessment upon their property was unequal, arbitrary, unreasonable, and in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The State Courts held to the contrary, and in effect declared the Statute providing for the Road Improvement District authorized the action taken by the Board, and that, so construed, it was a valid enactment. In this situation, it was said by this Court:

“The validity of the Statute having been adequately challenged, the case is properly here upon writ of error, and the petition for *certiorari* will be denied.”

In *Lake Erie & Western R. Co. v. State Public Utilities Commission*, 249 U. S. 422, 63 L. Ed. 684, it was contended in the Supreme Court by the Railroad Company, as it had theretofore been contended in the State Court, that the order of the Public Utilities Commission contravened the due process of law clause of the Fourteenth Amendment, in that it took property of the Railroad Company for private use or for public use, without compensation. On the question of the Supreme Court's jurisdiction, it was said:

“An order of a State Public Utilities Commission, upheld by the highest Court in the State, requiring the removal of a side-track by a Railroad Company, being legislative in its nature, and made by instrumentality of the State, is a State law, within the meaning of the Federal Constitution and the laws of Congress regulating appellate jurisdiction of the Federal Court over State Courts.”

These are but a few of the cases involving the determination and exercise of this Court's jurisdiction in cases arising under the second sub-division of Paragraph 237 of the Judicial Code.

As we have seen, plaintiff in error, William T. Price, the lessee of the land forming the subject-matter of this litigation, was by the Enabling Act given the preference right to purchase it at the highest bid when sold. The Legislature for the State elected to sell, and caused the land to be appraised, and ordered it sold. The Commissioners of the Land Office of Oklahoma claims to have refused to obey the mandate of the Legislature, as to Price's land, although he was present at the sale, offered to take it, under the Statute (Rec. 155), and, instead, caused it to be leased for oil and gas purposes to Magnolia Petroleum Company.

We contend that Price, as lessee of the land, had the right, which could not be constitutionally impaired or taken away by the Legislature, or by any authority exercised under the State, to buy the land and all of it, when sold.

If his land is to be denuded of its principal value, to wit, its contents, and the sovereignty and integrity of its surface (under Appendix "B"), then his right of purchase of the land given him by the

Enabling Act, with all that usually attends and is included in a sale of land, will be denied him.

We submit that the Supreme Court of the State, having upheld and sustained the validity of the Act of the Legislature, (Apx. "B") and of the authority exercised under the State by the Commissioners of the Land Office (Rec. 80) and the making the oil and gas lease (Rec. 14) on the lands theretofore leased to and occupied by Price, under the Enabling Act being an invasion of rights guaranteed to Price by the Enabling Act, and protected by the Federal Constitution, presents a case properly reviewable in this Court.

In reviewing the judgment of a State Court, in a case in which it was unsuccessfully contended that a State law deprived a party of rights secured by the Federal Laws and Constitution, the Federal Supreme Court is concerned, not with the characterization or construction of the State law by the State Court, nor even with the question whether it has, in terms, been construed, but solely with the effect and operation of the law, as put in force by the State, or as capable of being applied.

The foregoing is the rule recognized and often applied in this Court:

S. W. R. Co. v. Arkansas, 235 U. S. 350,
362; 59 L. Ed. 265-271;
Mountain Timber Co. v. Washington, 243
U. S. 219, 237; 61 L. Ed. 685, 696;
Crew Levick Co. v. Pa., 245 U. S. 292-294;
62 L. Ed. 295-297;
Corn Products Refining Co. v. Eddy, 249
U. S. 427; 63 L. Ed. 689.
Works Sec'y. v. U. S. ex rel. No. 251, de-
cided May 21st, 1923 (this Court).
Noble v. Douglass, 274 Fed. 672.

In the Corn Products case, there was involved the commerce clause, (Art. I, Par. 8) of the Constitution of the United States, and the Act of Congress of June 30, 1906, (Chap. 3915; 34 St. at L. 768; Comp. St. 1916, Par. 8717), known as the Food and Drugs Act. The Supreme Court of the State in its opinion said nothing about inter-state commerce, notwithstanding which it was said by this Court that in the state of the record, "defendant's activities against which relief was sought included incidental interference with plaintiff's interstate commerce" in the commodity known as "Mary Jane" syrup. Of the situation thus presented by the record, it was said in the course of the opinion:

"That the general judgment in favor of defendants amounts to an adjudication that the State law and regulations are to be enforced with respect to plaintiff's product, indiscriminately, not only when sold and offered for sale in domestic commerce, but also while in the

hands of the importing dealers for sale in the original packages, and hence, in contemplation of law, still in the course of commerce from state to state. The silence of the Supreme Court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the State law by the State Court, nor even with the question whether it has, in terms, been construed, but solely with the effect and operation of the law as put in force by the State."

The contention, therefore, of defendants in error that the opinion of the State Court involved merely a construction of the different provisions of the Acts of the Legislature of Oklahoma, and that "The construction so given will be accepted as conclusive in the Federal Courts," is, in view of the record and the foregoing rule respecting the jurisdiction of this Court, wholly untenable, because the State court denied the right to buy the land, or any of it, granted by the Enabling Act.

Another recent case in which, upon writ of *certiorari*, this Court reviewed and reversed the judgment of the Supreme Court of Oklahoma, is that of *Ward v. Love County*, 253 U. S. 17; 64 L. Ed. 751. In that case it was held that the right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether that right was denied or given recognition by the Su-

preme Court of Oklahoma was, as stated in the opinion, "a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It is, therefore, within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of the decision that were without any fair or substantial support." It was further noted that if non-Federal grounds, plainly untenable, may be put forth successfully, the power to review, in the Supreme Court of U. S. may be easily avoided, citing *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 589; 48 L. Ed. 1124-1129. On the particular subject of non-Federal grounds, the opinion reads:

"With this qualification, it is true that a judgment of a State Court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law, and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

So that regardless of the grounds upon which the opinion of the State Supreme Court was rested, the fact that defendants had specially set up, and

at all times urged rights secured to them by the Enabling Act and the Federal Constitution which rights are denied entitles them to have such rights considered and determined by a decree of this Court. Not to do so would, it seems to us, be, in the language of the Ward case, "neglecting or renouncing a jurisdiction conferred by law, and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

In short, this Court is not deprived of its jurisdiction because of the grounds upon which the State decision is based, whether that be by omission to pass upon Federal questions or silence in respect thereto, or the basing of the decision upon plainly untenable, non-Federal grounds.

It will be noted that the motion to dismiss is not directed at any error or omission, but predicated on our Federal question, being, *first*, "purely fictitious, one devoid of merit" (Motion to Dismiss, page 3, line 16) and *second*: that "plaintiffs in error have failed to show any reversible claim," which we diffidently suggest, tries the issue, and well submits the case on the merits, because if our claim has merit, it is due to the Constitution of United States or Acts of Congress.

It is *Cohens v. Virginia*, 6 Wheat 264, renewed, and there the Court quoted from the Constitution of the United States that “this Constitution, and the law of the United States * * * shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State, to the contrary notwithstanding;” and Justice Marshall, for this Court, said:

“The general government, though limited as to its objects, is supreme with respect to those objects,”

and, that it could “in effecting those objects, legitimately control all individuals, or governments, within the American territory.”

Introduction; Historical and General Statement of Case.

In 1890, when Congress organized the Territory of Oklahoma, it foresaw the necessity of endowing the schools of the territory and prospective State with an income beyond that derived from the taxable property of expected settlers. It, therefore, reserved from settlement two sections of the public lands for the purpose of being applied to the use of the public schools in the Territory and future State.¹ In this it followed a practice established since the organization of northwest territory and carried out upon the admission of all of the States since Ohio.² In some cases the lands were reserved and given outright to specific educational institutions, as Vincennes University.³ In some it was given directly to the territory with power of alienation as in Kansas.⁴ In others, as in Oklahoma,⁵ and Minnesota,⁶ it was given to the use of the territory during territorial days for its schools with a promise of conveyance to the State on organization. The power of Congress over reserved land prior to their complete alienation has universally been held to be

1. Organic Act, Section 18.

2. See Organic Act of various States.

3. *Vincennes v. Ind.*, 14 How. 268, 14 L. ed. 416.

4. *Stringfellow case*, 2 Kan. 263.

5. *Territory v. C. O. & W. Co.*, 20 Okla. 663.

6. *Minn. v. Batchelder*, 68 U. S. —; 1 Wal. 109, 17 L. ed. 551.

supreme, and the power of Congress to otherwise dispose of, encumber, or place limitations upon the title to the land prior to completion of alienation by grant of legal title, has remained unquestioned.⁷ In Oklahoma, to encourage the settlement and development of these lands and thus rapidly increase their productivity and income for the use of the public schools of the territory, and to aid the settlers in procuring homes, a temporary leasing agent was appointed, to-wit, the Governor, and later a board, to lease the lands under such rules as the Secretary of the Interior might make.⁸ The Secretary of the Interior in his wisdom made a rule which offered to any lessee leasing these lands the preference right of re-lease indefinitely.⁹ This rule was later enacted by Congress in 1894, and remained the law.¹⁰ This right of re-lease was in the nature of a preference right to continue leasing perpetually.⁹ This proposition of Congress was accepted by many people of the Territory who entered upon these lands and carried out their contract; and in contemplation of their preference rights of continuous re-lease, made permanent and

7. Union Pac. 1, Douglas 31 Fed. 540; Minn. 1, Batchelder, 1 Wall. 109; 17 L. ed. 551.

8. Act of Mar. 3, 1891, 26 Stat. L. 1043.

9. Noel v. Barrett, 18 Okla. 304.

10. Act of May 4, 1894, 28 Stat. L. 71.

immovable improvements of great value, such as fine homes, tillage, fences, orchards, etc.; thus greatly enhancing the value and productivity of the lands.

In the Enabling Act, Congress enacted that it would grant not only Sections Sixteen and Thirty-six for the support of the common schools, but also Sections Thirteen and Thirty-three as well, the former numbered sections being granted for the use and benefit of the University of Oklahoma and the University Preparatory School, the State Normal Schools, and the Agricultural and Mechanical College, and Colored Agricultural, Norman University; while sections Thirty-three were granted "for charitable and penal institutions and public buildings." The foregoing grants included only the above numbered sections in Oklahoma Territory, and certain indemnity lands in lien thereof. These grants, as a part thereof, contained certain limitations upon the power of the State, and guaranteed to the settlers holding leases on the above numbered sections, other than those provided for in Section 12 of the Enabling Act, preference right of purchase, the protection of which right gives rise to this suit. This legislation was prompted, no doubt, by the desire on the part of Congress to respect and hold in-

violate the assurances theretofore given the lessee settlers—that of ultimately acquiring the legal title to the lands occupied by them, and by reason of their acceptance of the congressional offer of 1891 and 1894 to take these lands with the preference right.¹¹

Congress, in its Deed of Trust (Enabling Act), preserved this preference right of re-lease and impressed it on the land, and its trustee.¹² Congress also granted the State permission to sell these lands under certain conditions or limitations specified and set out in the Enabling Act,—the principal one of which, so far as this case is concerned, was that the lands, when sold, should be offered for sale with the fixed preference right of purchase to the lessee.¹³ This, Congress clearly had the power and the right to do.⁶⁻⁷ The reservation of these lands by Congress was for the purpose of creating, later, a contemplated trust of the said lands to be reposed in the State as trustee, for their application to the use of the schools, and public purposes hereinbefore named, as evidenced by history.¹⁴ Such reservations, as to Sections Sixteen and Thirty-six, had uniformly been considered and held by the courts

11. Enabling Act, Section 10.

12. Enabling Act, Sections 9 and 10.

13. Enabling Act, Section 10.

14. *Territory v. C. O. & W.*, 20 Okla. 663, 95 Pac. 420.

to be reservations in trust for the use of the schools, and upon grant, to pass to the State in trust for the purposes specified therein.¹⁴ And, in the states, have been uniformly held by this Court in their administration of said lands, to be limitations, on powers and duty of a trustee.¹⁵ The people of Oklahoma, through their constitutional convention, accepted the grant proposed in the Enabling Act, upon the terms, conditions and limitations expressed in the Enabling Act, and for the uses and purposes, as to several different bodies of land, as in the Enabling Act expressly provided.¹⁶ Upon the admission of the State of Oklahoma to the Union, there came into existence a trustee empowered to take the said lands, and thereupon the legal title thereto vested in the State, in trust for the uses and purposes specified, and upon the conditions and limitations expressed in the Enabling Act and prior legislation of Congress.¹⁷

The right, therefore, of the lessee in these lands to a preference right of re-lease, and preference right of purchase, offered to him by the Congress, Enabling Act, in 1906, and accepted by him when

15. *Ervien, Com'r v. U. S.*, 251 U. S. 41, 64 L. ed. 128.

16. Oklahoma Constitution, Art. XI, Sec. 1.

17. *Minn. v. Ritchelder*, 1 Wall. 109; *Union Pac. v. Kargen*, 169 Fed. 459.

he took the land, formed a contract between the lessee and the Government which no legislation subsequent to the lessee taking possession thereunder could violate or impinge.¹⁸ It entitled him, of course, to exclusive and undisturbed possession of the land while either a lessee, or purchaser; and, of course, such right ran to the land and all of its component parts.¹⁹

When Congress offered to the lessee the use and occupation of the lands indefinitely as was the effect of the preference right of re-lease, for the annual charge or consideration therefor to be fixed by the legislative authority from time to time, it did not reserve any right or reversion, but retained only the right of re-entry for breaking of the conditions subsequent by the lessee, to-wit, non-payment, or waste. This, we think, gave the lessee an estate in perpetuity, without reversion or termination at the will of the grantor, and conditioned only upon his complying upon the two conditions subsequent of paying rent and committing no waste.²⁰ It was an estate of inheritance and a valuable property right²¹

18. *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363; *Dartmouth College case*.

19. *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717; *Ohio Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729.

20. *DePeyster*, 57 Am. Dec. 470 (N. Y.).

21. *Noel v. Barrett*, 18 Okla. 304; *Clark v. Frazier*, 177 Pac. 589.

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which no legislation subsequent to its attaching, could take away.¹⁸

In this case, the Commissioners of the Land Office of Oklahoma had undertaken to violate the compact between the government as grantor, and the lessee as grantee, and between the State as trustee for the Government, to the use of the schools and for public purposes, and lessee, by taking from the lessee the benefits of his preference right to this particular tract of land and trading a part of his tract of land to the Magnolia Petroleum Company in exchange for a small percentage of the expected minerals to be produced therefrom. The form of conveyance attempted by the Commissioners to the Magnolia Petroleum Company is a grant of the minerals in place capable of indefinite prolongation, and might indeed be in perpetuity and granted exclusive possession.²² It attempted to take from the lessee not only his right of possession of the lands, but his right of profit and enjoyment thereof, and totally deprived him of the preference right to the lands, secured to and earned by him by his acceptance of the proposition made to him by Congress and the State.

22. *Guffey v. Smith*, 237 U. S. 101; *Hoyt v. Flixico*, 175 Pac. 517. Rec. 14. *Daugherty v. Texas Co.*, 107 Tex. 226.

The action of the Commissioners was also in violation of law in that the conditions of the trust were that the State should hold and use the lands for the benefit of the schools, and for certain public purposes, or might, by appropriate legislation, sell the same, preserving the whole proceeds of the sale perpetually and inviolable in trust for the fund known, as to Sections Thirty-three, the charitable and penal institutions and public building fund.²³⁻¹⁵ The conveyance to the Magnolia Petroleum Company was not a sale within this meaning of the provision, but was, in fact, an alienation,²³ and was outside of the power and authority of the State as trustee, and violated the limitations placed on the trustee by the Enabling Act and accepted by the Consitution of the State.²³ It was likewise in violation of the State legislation which forbade the acquisition of these lands by pipe lines companies.²⁴ It was an attempt, also, to alienate a part of the permanent fund last above mentioned for a small percentage of the part alienated, and thus violated the limitations of the acts of Congress, and broke the faith of the State pledged in the Constitution to its per-

23. *Thomason v. Upsher Co.*, 211 S. W. 325, Const. & Enabling Act. *Dallas v. Club*, 95 Tex. 200, 66 S. W. 294.

24. Sec. 5, Act May 26, 1908, S. L. 1907-08, Page 491, Appendix "B", Sec. 5.

manence.²³ It was a perversion of the trust and a diversion of the fund.²³⁻¹⁵ If sustained, it would permit, if logically followed, the total ultimate dissipation of the estate and the fund. It was an attempt to alienate a part of the permanent fund,—land,—under the pretense of development of the other part forbidden by the Declaration of Trust,²³ as held by the Supreme Court in the New Mexico case.¹⁵ The lessee in this case has performed every condition proposed to him by congressional legislation relating to these lands; and had done or offered to do everything which he should, or could, do under the legislation, to acquire the legal title thereto.²⁵ He held a complete equitable estate, alienable and descendable, and had earned the legal title long prior to the institution of this suit.²⁵ As against the invasion of the Magnolia Petroleum Company, he was in actual, long-continued possession, and by force and arms retained possession until he yielded respect to the Court's temporary injunction and admitted the Oil Company in trespass, to the possession and destruction of a part of his land.

Under the peculiar congressional legislation pertaining to Oklahoma, which stands alone and which

25. *Lytle v. Arkansas*, 9 How. 333, 13 L. ed. 1153; S. L. 1909, p. 448, Sec. 1; *State of Wyo. v. U. S.* 255 U. S. 489.

is distinguishable from such legislation as to school and public lands in every other state, it is clear that the State did not take the lands free and unrestricted, either with unlimited power of control of the leased land, or the unrestricted power of alienation;¹⁵⁻¹⁶⁻⁹ therefore, did not take it "in fee simple as any other owner" as is the contention of the defendants in error, but took it as trustee of a double trust. First, to collect the income for the use and benefit of the permanent fund¹⁵ for which it was granted, and, second, to secure to the lessee the rights fixed in him by congressional legislation.²⁶ In execution of such duty, it had an alternative power, either to hold the legal title as trustee and to preserve to the lessee his vested right of continuous release and possession and to collect from him the periodical payments for such use of said lands, or to sell for present sum, the right to collect said payments; i. e. to sell its legal title subject to the limitations imposed by Congress, giving preference right of purchase (pre-emption) to the lessee at the time of sale, and to preserve the gross fund thus received²⁷ in lieu of the annual payments.

The State took no such estate in the lands under lease, as would permit the Commissioners'

25. Enabling Act, Sec. 10, and Const. Okla. Art. XI, Sec. 1.

27. Enabling Act, Sec. 8, and Const. Okla. Art. XI, Secs. 1-2-3.

effort to turn them over to the exploitation of pipe line companies and oil companies, and to do so is violative of the Declaration of Trust, (by which we mean to include all congressional legislation relating to said land), and infringes the individual vested rights of the lessee in violation of the acts of Congress and the Constitution of the United States under which the lessee claims protection and asserts his rights;¹⁹⁻¹⁵⁻²³ and violates State Stat. March 2, 1909, page 448, Section 1, Appendix "C", and Constitution of Oklahoma, Article XI, Section 1.

Injunction and accounting affords a proper remedy.²² The defendant, Price, has accepted the offer of Congress, occupied these lands, paid the price and vested in himself the preference right by his purchase in 1908-1909. He held this preference right under Enabling Act, and at the adopting of the Constitution, and became thereby vested with the permitted right of purchase²⁹ under the preference right granted by the Enabling Act.³⁰ When legislature passed the Acts of 1907-1908³¹ and 1909,³² it proposed appraisement of 1908 as the basis of sale,²⁸ and within a time fixed "sold" at appraise-

23. S. L. Okla. 1909, p. 452, Sec. 4, Apx. *sc*

29. Con. of Okla. Art. XI, Sec. 4.

30. Enabl. Act. Sec. 10.

31. Apx. "A".

32. Apx. "C".

ment of 1908. Price has complied with the law and has done all that was required of him, and demanded that the State's officers and agents comply with their part, and give him his title. He has done all things to do, and earned his title.³³

To verify the foregoing recitation, the following brief is addressed.

33. Findings, Rec. 152-157.

Argument.

The general Government entrusted to the State of Oklahoma the administration of this land to provide a fund (Enabling Act, Section 8) for "charitable and penal institutions, and public buildings," and said (Enabling Act, Section 10) that Section 33 may be leased, "under existing rules," (which rules gave a preference right of release, (*Noel v. Barrett*, 18 Okla. 304); and said that when sold, the "preference right" of purchase should be in the lessee. The Congress had, *first*, the right to so say, and *second*, the Government has the supreme judicial power to adjudicate its saying and enforce its command. The State, however, recognized this power (in the Constitution of Oklahoma, Article XI, Section 1), in acceding the "conditions and limitations" imposed in the Enabling Act. By the Constitution of Oklahoma, Article XI, Section 4, the people gave the State Legislature authority to sell the lands "in conformity" with the Enabling Act. This privilege the Legislature exercised by Statute of March 2, 1909, (Appendix "C"), selling Section 33 of the land, and others, or opening them to sale, and fixing the terms, conditions, and times, as therein expressed, upon which lessee might acquire title; and, in Section 3 of the said Statute, enacted "any

lessee, * * * shall have the preference right to purchase one hundred and sixty (160) acres, so leased, at the highest bid, at the time of the sale of the same, as hereinafter provided in this bill." (Appendix "C", Section 3b.)

The "time of the sale," as thereafter provided as to lands not leased "shall be" "immediately upon appraisement"; and was, as to leased lands "upon the expiration of *each* lease contract, or sooner, upon petition of *the* lessee." (Appendix "C", Section 15.)

The appraisement was ordered at the *First* Session of the Oklahoma Legislature, (Session Laws 1907-8) (Appendix "A"). Section 1 of said Statute extended the expired and expiring lease periods, including this one, to January 1, 1909, for return of appraisement of this land which was made January 12, 1909, (Record 98). This land then and there came under this law, (Appendix "C"), and was subject to immediate sale.

To use and apply the language in *Burton v. Traver*, 130 U. S. 232; 32 L. Ed. 920, the State, by this Statute, made the lessee a "promise to sell him his home on those terms, entered into a contract with him on the subject." No fault is found with this legislation, (Appendix "C"). It left no discre-

tion in the Commissioners as executive officers. It was their *duty* to cause appraisal,—which had been done,—and to sell; no excuse for delay, or refusal therefor was invited or countenanced in the Statute. It was the lessee's *right* to have it offered, at once and to take it at high bid, or at appraisal, (Appendix "C", Section 11), if no bid was made; *i. e.* to have the Statute executed. The settler had complied with this law and offered to take it at the district county sale, at appraisal. (Rec. 155, finding 8 and 13, and Record 157, finding 5.) Can the Commissioners defeat his rights, either by mere neglect or purposeful evasion, when he did all required of him, and all that he could do? This Court said "no" in *Lytle v. Arkansas*, 9 How. 333; 13 L. Ed. 153; *Payne v. New Mexico*, 255 U. S. 367, 65 L. Ed. 680.

As said in *Pennoyer v. McConaughy*, 140 U. S. 1; 35 L. Ed. 363, "the transaction, as set forth in the Statute, has all the elements of a contract of sale. The Statute is a formal standing offer by the State of these lands for sale on the terms and at time therein mentioned, etc." *to the lessee*. It effectually excludes any idea that the Commissioners can dispose of it *to others*, or on *other* terms, or for *other* purposes, or prevent its sale as commanded,

or prevent in any way its acquirement in entirety by beneficiary of the Legislation; and any subsequent legislation, or executive action by the State that impaired or destroyed these rights belonging to the lessee under the Enabling Act and this Statute, violated the United States Constitution, Article 1, Section 10.

Pennoyer v. McConnaughy, 140 U. S. 1;
35 L. Ed. 363;

Betts v. Commissioners, 27 Okla. 64.

The leasing of reserved lands began in Governor Steele's time, 1891, (Rec. 129-133), and under the rules prescribed by the Secretary of the Interior, (Rec. 133-134). Congress enacted said rules: Act of May 4, 1894; (28 St. at L. 71.) Such rules gave the lessee a preference right of release that was "property" of value, consideration for a note, and was subject to barter and sale, a right, and a species of title.

Noel v. Barrett, 18 Okla. 304.

It was, in legal effect, an option; and it was held that an optionee, even before election to purchase, had and held an "equitable estate in the optionee."

Clark v. Frazier, 177 Pac. 589, 74 Okla.
—, (Not officially published.)

This was the rule of property before statehood in the territory, (*Noel v. Barrett*) in the light of

which Congress passed the Enabling Act. There being no exclusion or prohibitions in the Enabling Act, that Act carried over the law and rights of its day, in view of which conditions it was adopted. It was so held in many States, and Oklahoma followed. *Trapp v. Cook Construction Co.*, 24 Okla. 850, at p. 855. See *Betts v. Commissioners*, quotation p. 16 post. This was recognized, followed, and confirmed by the Supreme Court of the State in *Clark v. Frazier*, decided after statehood.

~~The~~ rights were transferable, and the transferee stood in the shoes of the transferrer.

Twigg v. State Board, 27 Utah 241, 75 Pac. 729;

Noel v. Barrett, and *Clark v. Frazier*, *supra*.

—and such preference rights, once acquired, cannot be extinguished except by due process of law.

Slusher v. Simpson, 67 S. W. 380; 23 Ky. Law, 252;

Bratton v. Cross, 22 Kan. 674;

Wing v. Dunn, 127 S. W. 1101 (Tex.);

White v. Douglas, 71 Cal. 115, 11 Pac. 860.

The State took the lands in trust—

Errien v. United States, 251 U. S. 41;

Betts v. Commissioners, 27 Okla. 64,

wherein the following expressions occur:

“of such trust funds”, etc. 27 Okla. at page 73, line 29;

“of the State, which is the trustee”, 27 Okla. at page 77, line 12;

“The trustee, which is the State”, 27 Okla. at page 80, line 12,

showing clearly that the State's first adjudication recognized and expressed its trust character, and subject to all the terms, conditions and limitations of the grant. The State granted the Legislature the right to sell said lands, preserving the fund.

Constitution of Oklahoma, Art. XI, Sec. 4.

The State in 1909, by the Legislature, elected to sell said land and fixed all the rules and regulations therefor, saying in mandatory language:

“The Commissioners *shall* dispose of, sell and convey, subject to the limitations, exceptions, conditions, rules and regulations and instructions, as provided in the Enabling Act”, etc. (Appendix “C”, Section 1.)

The Legislature did not regard the State as a patentee with “plenary power”, as asserted by the State and the Magnolia Petroleum Company in motion to dismiss, or it would not have recognized these “limitations, conditions, rules and regulations and instructions” of the Enabling Act.

This Statute (Appendix “C”) did not except this Section 33 from its operation. On the contrary,

it specifically ordered all Sections 33 sold except those "known" mineral lands (Sec. 1). After this legislation, therefore, the Commissioners had but *one* power, and *one* duty—that of selling. They could not thereafter withhold, withdraw, or lease, or alienate, or barter, in any way, except by complete "sale and conveyance", in obedience to the law.

Thomasson v. Upshur Co., 211 S. W. 325, (Tex.);

Deffenback v. Hawke, 115 U. S. 392, 29 L. Ed. 423;

Davis v. Wichold, 139 U. S. 507, 35 L. Ed. 238;

Lytle v. Arkansas, 9 How. 315, 13 L. Ed. 938;

neither could they withhold from sale (Appendix "C", Section 1) in violation of, or by violating the Statute, *Lytle v. Ark.* (*supra*). The rule and regulation power was by the Enabling Act vested exclusively in the *Legislature*, not in the Board. It was a power not to be delegated.

Betts v. Commissioners, 27 Okla. 64; 110 Pac. 766;

Haskell v. Haydon, 33 Okla. 518; 126 Pac. 232.

We urge consideration of the decision of the Oklahoma Supreme Court in *Betts v. Commissioners*, 27 Okla. 64, as showing—

First. That it stands decided in this State that the State took this land in trust, with the trust conditions and limitations imposed, and that the Commissioners have no authority save as conferred by Legislature.

Second. That the power to prescribe rules and regulations vested in the Legislature was not to be delegated to the Commissioners. 2nd Syllabus, 5b.

Third. That the regulations of the Secretary of the Interior, promulgated in 1891, had the force and effect of law, and were continued in force in the state by Section 10 of the Enabling Act (27 Okla. p. 65; Syl. 5, and p. 74 line 20).

Fourth. That if these rules had the "force" of law, then the rules of property established by *Noel v. Barrett*, 18 Okla. 304, and *Clark v. Frazier*, 177 Pac. 589; 74 Okla. —, (not published) were confirmed as correct decisions; and the further conclusion follows that the preference rights existing thereunder of lease and re-lease were likewise carried over by the Enabling Act, Sec. 10, (*Trapp v. Cook Con. Co.*, 24 Okla. 850 at 855); and any legislation of the state that would impair those rights would be repugnant to the Act of Congress, and the Constitution of the United States.

Fifth. That if the Enabling Act, Sec. 10, carried over the rules and regulations, and rights attached, into statehood, then the same Enabling Act, Sec. 10, carried into statehood the preference right of purchase granted by the Enabling Act, Sec. 10.

Sixth. That the Legislature of the state, having exclusive power to make rules and regulations, the statute (Apx. "C"), was exclusive and mandatory.

We quote the applicable portions of the opinion from the Betts case for the convenience of the Court :

"the only limitation upon the power of the Legislature relative thereto being that same shall be sold, rented and managed by said commissioners, and that the funds and proceeds derived therefrom shall be under their charge (section 32, art. 6, Const. Okla.), but the *manner* and *terms* of the sale or leasing of such lands shall be subject to the conditions of sections 8, 9 and 10 of the Enabling Act."

"Said section of the Enabling Act clearly permits the public lands by its terms granted to the state to be leased for prescribed periods under such rules and regulations as the Legislature of the state, after the erection of the state government, may prescribe; but, until such time as such rules and regulations may be prescribed by the Legislature after the erection of the state government, such lands are required to be leased under the then existing rules and regulations. The only legislation either by Congress or the Territorial Legislative Assembly

that has been called to our attention or we have been able to find is the following acts: Act May 4, 1894, c. 68, 28 Stat. 71; Act March 3, 1891, c. 543, 26 Stat. 1026; Act March 6, 1899, c. 25, art. 2, p. 196, Sess. Laws Okla. Ter. The act of March 3, 1891, provides that the lands reserved in said territory by said act may be leased for a period not exceeding three years for the benefit of the school fund under regulations to be prescribed by the Secretary of the Interior. The act of May 4, 1894, provides that certain lands reserved therein for educational and building purposes, as well as all the school lands in said territory, may be leased under rules and regulations, thereafter prescribed by the Legislature of said territory, but, until such legislative action, the Governor, Secretary of the Territory, and Superintendent of Public Instruction shall constitute a board for the leasing of said lands under the rules and regulations theretofore prescribed by the Secretary of the Interior, for the respective purposes for which the said reservations were made, except that it shall not be necessary to submit said leases to the Secretary of the Interior for his approval."

"by the terms of section 10 of the Enabling Act, the rules and regulations existing relative to the leasing of said lands were continued in force in the state until the Legislature of the state prescribed rules and regulations for the leasing of the same. Rules and regulations for the leasing of said lands simply mean the laws enacted for the leasing of same and the rules promulgated by the Secretary of the Interior which had the force of law to govern as to the leasing of such lands."

"and we are constrained to hold that, under the terms of the Enabling Act, the existing rules

and regulations relative to the leasing of said lands were continued in force in the state until the Legislature prescribed rules and regulations”

“The Commissioners of the Land Office, by virtue of section 32 of article 6, ‘have charge of the sale, rental, disposal and management of the school lands and other public lands of the state and of the funds and proceeds under the rules and regulations prescribed by the Legislature.’ This board has *no power to act* other than under rules and regulations existing under the Territory of Oklahoma continued in force by virtue of section 10 of the Enabling Act, or by rules and regulations as prescribed by the Legislature of the state.” (Italics ours.)

Section 9 of article 9 of the Constitution of the State of Colorado provides:

“The Governor, Superintendent of Public Instruction, Secretary of State and Attorney General shall constitute the state board of land commissioners, who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law.”

“If as contended in this case, the state board has the power to lease the state lands in such manner as will, in its judgment, secure the maximum amount therefor, without regard to the statute, then the provision reserving the right to the Legislature to prescribe regulations is not effective for any purpose. It would be useless to prescribe regulations, if such regulations might be ignored whenever, in the judgment of the board, a greater revenue might be secured to the state by adopting a course in

conflict with the statute. Such a construction would place in the state board plenary power over the state lands. Instead of leasing them for twenty years, as now proposed, one board might lease all the state lands for a period of ninety-nine years, and subsequent boards would, in effect, be stripped of all power."

(This portion of this decision is directly violated by the alleged oil lease (Rec. 14) which run for "5 years" and as long, etc. as oil or gas or either, "is found in paying quantities" which is capable of indefinite duration, post p. 19. Hence this Board undertook, as to mineral lands, to lease, maybe for perpetuity, and thus foreclose future Boards and violate the 5 year limitation placed in Enabling Act, Sec. 8.)

"Section 32, art. 6, supra, has the effect of placing the control of the sale, renting and managing of the school lands and other public lands of the state and of the funds and proceeds derived therefrom in the hands of the Commissioners of the Land Office, but with the limitation that they shall act only under rules and regulations prescribed by the Legislature.

"The title to the land is in the state, and the board is merely a governmental agency of the state, which is trustee."

City of Chicago v. People ex rel Miller,
80 Ill. 384;

Jernigan, Treas. v. Finley, Comptroller,
90 Tex. 206, 38 S. W. 24;

Knorr County v. Humoll, 110 Mo. 67; 19
S. W. 628.

"The provisions of this act of May 4, 1894, provide that all the expenses and costs of the leasing of said lands shall be paid out of the

rentals. There was no constitutional provision at that time providing that an appropriation should be effective only for a certain, definite time after its enactment, or that it must specify the sum certain. It was a valid, continuing appropriation as it existed under the laws of the Territory of Oklahoma, and if, by the terms of section 10 of the Enabling Act, it was brought over and kept in force in the state until the Legislature of the state prescribed rules and regulations, it is still a valid, continuing appropriation until the Legislature acts."

"In passing, it may be well to state that there is a serious question as to whether section 20 of said act, providing that 'the commissioners of the land office may make such other and further rules and regulations governing the public lands of this state as not in conflict herewith,' is valid, in that it confers legislative power on said commissioners which is vested within the Legislature, and not subject to be delegated. The case of *State ex rel Rush v. Budge et al.*, *State Capitol Com'rs*, *supra*, seems to conclusively settle that point."—from Betts case.

Such being the rights and privileges and immunities of the lessee, no subsequent legislation could avoid, impair, take, or deny the right granted.

Dartmouth College case;

State v. McPeake, 47 N. W. 691;

State v. Thayer, 64 N. W. 700;

Wing v. Dunn, 127 S. W. 1101;

State v. Butzville Bank, 144 N. W. 105;

Pennoyer v. McConaughy, 140 U. S. 1.

The lease of this land for oil and gas purposes is an "alienation", and a conveyance of the minerals, and the use of the land.

Eldred v. Okmulgee, 22 Okla. 742;
Hoyt v. Fixico, 175 Pac. 517 (Okla.).

Following and citing Federal authorities:

U. S. v. Noble, 237 U. S. 74; 59 L. Ed. 844;
Guffey v. Smith, 237 U. S. 101;
Southern Oil Co. v. Colquitt, 28 Tex. Civ. App. 292, 69 S. W. 169.

This "lease" to the Magnolia is, if anything, capable of indefinite duration, in perpetuity, and a *grant in place*. It reads:

"does hereby demise, grant, lease and let * * for the term of five years * * and as long thereafter as oil or gas, or either of them, is produced in paying quantities, all the oil *deposits*, and natural gas *in or under* * * * described tract," etc. "It conveys the substances named themselves in the ground"

Texas Co. v. Dougherty, 107 Tex. 226;
176 S. W. 717;
Guffey v. Smith, 237 U. S. 101.

Correspondingly, since a lease, or grant in place, whichever it is, such as the Magnolia Petroleum Company relies upon, is an alienation of part of the land or estate, we assert that if the Enabling Act gives to the lessee, who takes and improves the land, any "option" or "preference right" to purchase the land sometime, such option or right extends to all the land and its contents, oil, gas and water, and the taking away of these parts, and of its possession

without lessee's consent, is a deprivation of property or right, claimed under Act of Congress, in violation of the Constitution of the United States.

In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. Ed. 729, this Court said:

“The right to oil and gas beneath his land is an exclusive and private property right in the land owner * * * of which he may not be deprived without taking of private property,”

also we cite *Thornton Oil & Gas*, Sections 19 and 20; *Gould on Waters*, Section 291; *Gruner v. Hicks*, 230 Ill. 536; 82 N. E. 888; *People v. Bell*, 237 Ill. 332, 86 N. E. 593.

Therefore, if any right to, or claim upon this land was given the lessee, Price, by the Enabling Act, it extended to the oil and gas therein and thereunder, and the State could not, by legislation or Commissioners by authority exercised under the State, take it away except by violating the Constitution of the United States.

In this view, we assert also, that neither the State nor its officers could take this interest and right away from Price and give it to the Magnolia Petroleum Company because to do so is taking private property for *private* use and is forbidden by law and in the Constitution of Oklahoma it is for-

bidden. It is a denial of due process of law guaranteed by the Constitution of the United States.

Nichols on Eminent Domain, Vol. 1, p. 114;

Oklahoma Constitution, Art. II, Sec. 23;
Constitution of U. S., Amendment V.

The "lease" or "grant" to the Magnolia, subsequent to the Sale Statute (Appendix "C") also carried the right of exclusive possession of such part of the land as the Magnolia saw fit to take, which it exercised and did take and destroyed Price's occupancy, use, fences, orchard, water and property of several kinds. This violated Price's right of peaceful possession granted by his lease, his right of use, and right of property, and being capable of extension to cover all the land, and capable of indefinite duration to cover all time, or at least, or most, all of Price's allotment of time, was an unconstitutional invasion of his right granted by the Enabling Act and the Statutes of the State. (Appendix "C".)

Guffey v. Smith, 237 U. S. 101, and cases above cited, p. 76.

In approaching the consideration of this question, of what the Enabling Act gave to the lessee of the involved land, certain established principles occur to us.

The first is to ascertain what object Congress intended and attempted to accomplish by the "preference right" granted by Section 10. The language occurs in no other Enabling Act which we have found. It was not put in inadvertently or accidentally. Prior to the passage of the Enabling Act, the reserved public lands of Oklahoma had reached considerable proportions, four sections from every township, or one-ninth of the area of the former Oklahoma Territory, or, according to House Committee's report No., 3,128,362 acres, or 19,514 quarter sections, about equalling five thousand square miles, and nearly that many families.

The lessees had reclaimed this raw land, built homes, farms, fences, barns, orchards, wells, drainage and irrigation ditches, roads, churches and schools. Their land was "appraised" periodically and they paid four per centum (4%) of the appraisal annually—practically a four per cent annual tax on the land, and the same local tax on improvements and personalty as their neighbors paid on their property. They paid from two to four times as much "land tax" as was paid by the homesteader after acquiring the fee. The homesteader had either five or seven years before final proof, in which

he had exemption from land tax. The lessee had no such exemption. He paid from the opening shot. The lessees were a considerable political factor in the Territory, as they had about 16,000 votes, and each always had some persuadable friends; he had the School Land Lessees Association; he had weight. The Secretary of the Interior, in 1891, had established certain rules giving preference right of release, (Rec. 133). They were enacted by Congress May 4, 1894, 28 Stat. at L. 71; the right was confirmed by the courts as a title and valuable property right,—a sellable right—before statehood.

Noel v. Barrett, 18 Okla. 309, *supra*.

It was held an option after statehood in *Clark v. Frazier*, 177 Pac. 589; 74 Okla. —(not reported).

In this status, with statehood imminent, Oklahoma Territory's delegate in Congress, Hon. Dennis Flynn, asked Congress to secure to the lessees the preference right of lease and re-lease which they then had under former legislation, and the preference right of purchase when the state elected to sell. This Congress did, to its great credit, and consistent with its former policy toward the pioneer. (Section 10); post p.—.

The lessee accepted it at face, as did the First Legislature of the State, as manifested by the ap-

praisal Statute (Appendix "A") and by the Sales Statute (Appendix "C"), but the oil idea fastened its tentacles upon the public land and the desire for greater gain on the part of the State, and others, induced a disregard of the preference rights extended by the Enabling Act to the lessee, who had reclaimed the wild land. The oil idea secured the passage of the "deeming" Statute (Appendix "B"). The acquiring of oil rights in public lands, or at least a pretense thereof, seems exceedingly easy. There are so many rich arguments about so enriching the public coffer that it seems irresistible to the man temporarily in public office; but Congress in 1906, looked to the patient pioneer who had spent twenty-seven years improving these lands, and whose tax for schools had supported them in the beginning and been continually increased, as he had increased its value.

Congress intended to protect this settler in his land possession or it would not have inserted this preference right clause. It could have left it out. If it only means, and effects, what the Oklahoma Supreme Court said it meant, and effected, "nothing", then it could, and should have been left out. Our Supreme Court treated the Enabling Act exactly as if it had been left out. The Magnolia's

counsel asserts that, under the Enabling Act, the Legislature had "plenary power" over this land; that can be true only if this "preference right" clause had been left out, or is adjudicated "out".

Congress did not leave it out.—Our Legislature in Appendix "B", and our State Supreme Court in this case, only, did. We now ask that its presence in the Act of Congress be enforced by this Court.

In a contest between a settler and his opponent, this Court has always said the legislation was to be construed favorably to the settler.

Clement v. Warner, 24 How. 394; 397;
16 L. Ed. 675, 696;

Bohall v. Dilla, 114 U. S. 47, 51; 29 L.
Ed. 61, 63;

Moss v. Dorman, 176 U. S. 413; 44 L. Ed.
526,

A public grant of lands is a contract and is protected by the Constitution of the United States.

Fletcher v. Peck, 6 Cranch 87, 137;

Green v. Biddle, 8 Wheat 1; 5 L. Ed. 547;

Cooley, Con. Lin. 328, note p. 330.

The grant of a right, privilege or immunity is likewise protected.

Dartmouth College Case, 4 Wheat, 518.

A grant of public lands that are free and clear is a grant *in presenti*.

Lake Superior Construction Co. v. Cunningham, 155 U. S. 354; 39 L. Ed. 183.

A grant, therefore, to the State, in trust, of lands encumbered by lessees holding an estate capable of sale and enforcement already acquired under Act of Congress (28 St. at L. 71), and already adjudicated and established by the Court (*Noel v. Barrett*, 18 Okla. 304); and holding pursuant to, and in execution and furtherance of the purpose of the trust; and who are recognized in the Act of Grant, and whose rights are recognized, preserved and extended by the Act of Grantee (Constitution of Oklahoma, Article XI, Section 1), cannot justifiably be said to have passed to the grantee State with "plenary power" in the State, to override these rights, and one of the very purposes of the Act, and all the very beneficiaries, who could be the only occasion of putting the "restrictions, limitations, and conditions" in the Enabling Act.

The State saw and recognized this, and specifically enumerated its restrictions in its acceptance (Oklahoma Constitution, Article XI, Section 1), and Statute, Appendix "C", Section 1.

"It is not important to inquire as to the power of Congress to pass this law * * as the assent of the people through this convention * * * must be regarded as binding the State."

Minn. v. Batchelder, 68 U. S., 551, 1 Wall 109.

The Oklahoma Constitution, Article XI, Sec. 1, expressly enumerates the conditions on the public lands "under the provisions of the Enabling Act and any other Act of Congress," (which includes the Act of 1894, giving the lessee a preference right under the rules adopted, 28 St. at L. 71); and the "faith of State" was pledged to this observance by said Section 1; and the sale was authorized only "in conformity with the Enabling Act." (Oklahoma Constitution, Article XI, Section 4.)

We think the decision of the Oklahoma Supreme Court in this case violates that pledge of faith in Section 1, and defeats the "conformity" required by Section 4.

This grant by the Enabling Act, seems to be on condition subsequent to the Government which the Government has the right and power to enforce.

Errien v. U. S., 251 U. S. 41;
State v. McMillan, 12 N. D. 280; 96 N. W. 310;
School District v. State, 213 S. W. 961 (Ark.);
Green v. Robinson, 109 Tex. 369, 210 S. W. 498.

The known conditions at the time of the grant (Enabling Act 1906) governs and controls the

grant, (*Trapp v. Cook Construction Co.*, 24 Okla. 850); and if the Enabling Act granted the lessee any right, privilege or immunity, he being then and there in possession as lessee, and holding the congressionally granted preference right of lease and re-lease, had then and there the "capacity to receive it," and did receive it, (*Vincennes v. Indiana*, 14 How. 268; 14 L. Ed. 416); no subsequent legislation could change it (*Dartmouth College Case*), and no subsequent discovery of condition of oil, gas or water, or other mineral could, after his right attached, affect his prior right in existence.

- Wyoming v. United States*, 255 U. S. 489;
65 L. Ed. 742;
Deffenback v. Hawke, 115 U. S. 393; 29
L. Ed. 423;
Davis v. Wiebold, 139 U. S. 507; 35 L.
Ed. 238;
Dorer v. Richards, 151 U. S. 658; 38 L.
Ed. 305;
Shaw v. Kellogg, 170 U. S. 312; 42 L. Ed.
1053;
United States v. Silver Mining Co., 128
U. S. 673; 32 L. Ed. 571;
Burke v. Southern Pacific R. Co., 234 U.
S. 699; 58 L. Ed. 1527;
*Colorado Coal & Iron Co. v. United
States*, 123 U. S. 307; 31 L. Ed. 182;
Green v. Robinson, 109 Tex. 367, 210 S.
W. 498;
Saunders v. La Purisima Gold Min., 125
Cal. 159; 57 Pac. 656;
No. 3 Land Letters, Sep. 26, O. L. 8-03,
5308-6417;

Ind. Div. 7006, 1901, Dept. Int. by Van Deventer, (now Justice), approved October 28th, 1901.

In the *Minn. v. Batchelder* case, 1 Wall, 109; 17 L. Ed. 551, Congress, in the Enabling Act of Minnesota, granted certain reserved lands to Minnesota; but before the acceptance thereof, Congress, by joint resolution, made the land subject to preemption to those *then* within the preemption act. It was held valid and enforced by this Court ahead of the States claim of title. It seems clear, therefore, that the preference right of lease and re-lease, established by the Act of 1894 (28 St. at L. 71) was carried over, and of purchase, established by the Enabling Act of Oklahoma to those who brought themselves within the provisions as a lessee, was ahead of the State and could not be subsequently affected. This decision was in 1864, so must be taken as known to Congress, the Oklahoma Constitutional Convention, and the Oklahoma Legislature. If such is the case, the doctrine of the Trapp case, and *Pennoyer v. McConnaughy*, 140 U. S. 1, surely applies.

We take it further that the Sales Act of Oklahoma, 1909 (Appendix "C"), exactly meets the conditions of the law considered in the *Pennoyer* case, *supra*, and that

“The Statute (Appendix “C”) was a formal standing offer by the State of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States (lessees) to become purchasers, etc.”

That the relation of lessee assumed thereunder, or continued thereunder, was an acceptance and

“thenceforth there was an agreement * * binding on each of them until released therefrom, etc.”

—exactly as expressed in the Pennoyer Case.

Forced Sale.

We want it distinctly understood that this is not an action by Price to force or compel the State to sell this land, as continually reiterated by counsel for Magnolia and the State, and used as a refuge by the Supreme Court of Oklahoma in its opinion.

We want to be clearly understood as asserting that we consider—

(1) That the Enabling Act gave permission to the State to sell if the State so elected.

(2) That the Constitution of Oklahoma, Article XI, Section 4, gave such permission to the Legislature.

(3) That the Legislature by the Sale Statute of 1909 (Appendix “C”), elected to sell, fixed all

the terms and conditions, time, and manner, of sale and of acquisition, and left nothing to negotiation or alteration by the Commissioners, and enacted that the Commissioners "shall sell" under those terms. That it was "mandatory."

(4) That the defendant, Price, lessee, accepted such Statute, demanded his land at the auction, at his Court House, when all there was offered, and there being no other bidders, offered to take it at the appraised value on the terms fixed by the Statute (Appendix "C"). (Record 154-155, finding of fact, 9, and 8.) He did all he could do.

(5) That thereby, in legal effect a sale was consummated and the equitable estate passed, Price having done all the law imposed upon him, and the Commissioners having no option or discretion in the matter, and no power of refusal. (Rec. 157, finding 5.) Authorities post, p. ~~8~~97

The Trial Court so found (Rec. 154-5 findings 7 to 13) and ordered an accounting between him and the State, and between him and the Magnolia Petroleum Company. (Rec. 158.)

The Supreme Court of Oklahoma *did not* disturb these findings of fact at all, and reversed the decree on the theory only that Price had no preference right in or to the land.

Complete oil development of a piece of land brooks no interference, and renders the land valueless for all other purposes and for all time, except such small salvage as might be from removed improvements.

The State and the Magnolia Petroleum Company argue, and the Supreme Court opinion argues that if no sale was decided upon and made by the State, as Trustee, then no preference right would exist in, or at least be available to a lessee; this ignores, we think, Apx. "C"; that there having been no sale (as they claim) that no preference right of purchase exists in Price, the lessee; that, therefore, no preference right yet being *in esse*, no claim of it can be urged or sustained; that their right to divide the land, take the contents, and destroy its surface, devastate Price's occupancy, his products, improvements, labor and hope, anticipated the existence of his right, and, therefore was free and untrammelled by the Enabling Act. This they did with a completeness impossible to exaggerate or magnify; but it is not made clear just what benefit this preference right, given to the lessee by the Enabling Act, would have if postponed in its existence until a "sale" of the land or after the "sale", or destruction. What value would there then be to a preference right to

buy what is left? Or what might be left, in a more or less complete state of destruction, attendant upon oil development, or other circumstances, such as sand pit, rock quarry, or water extraction, the relict of which is slush pits, salt water, excavations, saturation of soil with oil and salt water, alkali water, and other substances poisonous to life and vegetable growth; with pipe lines from oil and gas escape; anchors and obstructions; tanks and storage excavations and sites; timber denudation and water appropriation, and exhaustion. If the State Statute can authorize severance and sale separately of the water, or oil, or gas, it can "segregate" or sever sand, silica, gypsum, stone, granite, asphalt, zinc, lead, or any or all known minerals, or things and sell them, or "lease" them one by one, or all together as from time to time pleased the vagaries or satisfied the speculative ambitions of the exploiters, the Legislature, the Commissioners or other executives. What then, would the preference right to purchase be worth? Nothing, of course. That argument is equivalent to denying any effect to the preference right clause, because the right to take part of the land would ultimately lead to the right to take all, and leave nothing for the preference right clause to attach; and, as all of these constituents of land in Oklahoma would thus be sold

and removed, either one by one or all together, would the "lessee" have the preference right to buy each, every, all, or singular, or, as the Magnolia contended, must he sit helplessly on his farm and await what the fates send, or leave? If so, the "preference right to purchase" means nothing, and Congress did a useless and heartless thing in inserting it; or again: Just what avail would a preference right to purchase be after a "sale" had been had? In operating for oil, the surface is destroyed for all other purposes; then, where operations performed, is that land then yet "unsold"? If so, when can it be "sold", and to what would the preference right of purchase attach? And what its value?

If, on the other hand, the State may alienate the oil, gas, water, sand, stone, or other elements, on the theory that no preference right, under the Enabling Act attaches to the land, where is the sound basis for this, their theory that the preference right attaches to what is left? If it attaches to the rind, as this State urges, it ought also to attach to the meat, and if it attaches, as the State urges, after a "sale", it must also attach as a right capable of being protected before sale, else there might be nothing left to sell, and, therefore, the lessee derives no benefit. Congress is not complimented by such an argument on the construction of its Enabling Act.

Where the terms of a statute are plain the courts are not at liberty to go outside to hunt for a meaning which may be imagined to have been the intent of Congress.

U. S. v. The Sadie, 41 Fed. 396;
U. S. v. Railroad Co., 91 U. S. 72.

It was urged by the plaintiffs that the Commissioners had refused to "offer" said land, at said time, at said Court House, and that there was, and could be no sale, and that this defendant's answer is to compel a sale. This theory necessarily presupposes—

(1) That the Commissioners, by refusing to "offer" at the Court House auction, could defeat the command of the Legislature that they "shall sell," and that the Lessee might buy.

(2) That, therefore, the Commissioners are superior in power to the law.

(3) That being so as to one quarter section in the county, then they could be as to any or all in the county, and it follows all in the state. Thus the Sale Statute be completely defeated.

(4) That the Commissioners, having elected, as to this quarter, or all quarters, to not sell in obedience to the law, they cannot be compelled to sell, and are, therefore, superior to the law.

(5) That being above the law of Oklahoma (Apx. "C") they, therefore, and consequently, are above the law of Congress, the Enabling Act; and can lease the land to an oil and pipe line company, for a time "capable of indefinite duration," notwithstanding the preference granted to lessee, and not withstanding the mandatory terms of the Enabling Act and the Sales Statute (Apx. "C"), which has never been repealed.

(6) It was, and may be urged, that the "preference right" was a valueless thing, as that no sale might ever take place, and that until it did, no one had a right to look to it.

This is a queer practice, in view of the laws we have cited (Enabling Act; Constitution of Oklahoma, Art. XI, Sec. 4; Sales Law, Apx. "C") as the idea, also presupposes the Commissioners to be superior to the law, and to override Apx. "C"; also overlooks the law of Oklahoma, May 26, 1908, Chapter 49, Article III,

"Sec. 21. All preference rights, vested rights and equities, shall be inherent rights."

This preference right and equities being established by the Enabling Act were by the state made to "inhere" either in the lessee, or the land, or both. It is equivalent to saying that the doctrine of *Noel v. Barrett*, 18 Okla. 304, and *Clark v. Frazier*, 177

p. 589, —, (Okla.) —(not published) is fixed—*in-heres*. These opinions, and the principles thereby established were by the state Supreme Court in this case overlooked, or at least not given effect. The theory that one, holding preference right of purchase, or option, cannot enforce his right until after he or some one else buys, is a doctrine to which we cannot assent. That course of action, and policy, pursued by the Commissioners, not only would result in Price being deprived of the opportunity to acquire a legal title to his lands, but it set at defiance his rights even to acquire such lands in their entirety, by disregarding with impunity the Enabling Act and sales statute. Leasing the lands for oil and gas if allowed took from the land its most valuable components, the contents, and the right of use, and possession. Merely to have disregarded the land and to have withheld the land from sale, for a time, would have only postponed the full enjoyment therein by Price. While this would have been we think, a clear invasion of his right, it is not comparable with what was actually done: the leasing of the land by the Commissioners, for oil and gas and the taking therefrom of all that, which made it valuable, both its integrity and its possession and use.

The findings Rec. 152—*et sequitur*, being undisturbed are accepted by this Court.

Myers v. Heltinger, 94 Fed. 370.

There are cases from this Court which we think justifiably leads us to hope that their position is not so absolute as asserted.

First: Equity looks upon that which ought to be done, or ought to have been done, as done; and for the purpose of reaching justice will consider that parties have performed duties which they ought, under the law, to fulfill, and when it interposes to compel the performance of an act which has been contracted to be performed, it treats it as performed at the time due.

Dunn v. Yakish, 10 Okla. 388, 61 Pac. 926;

Speicher v. Lacy, 28 Okla. 541, 115 Pac. 271; 35 L. R. A. (N. S.) 1066;

Fouts v. Fondray, 31 Okla. 221; 120 Pac. 960; 30 A. & E. Ann. Cas. 301;

Carter v. Sapulpa Ry. Co., 49 Okla. 471; 153 Pac. 583.

It should, therefore, be considered that the sale law (Apx. "C"), having commanded the advertisement and offering of this land at the Stephens County sale on January 11, 1911, (Rec. 117), it was so done; that the Court, having found (Rec. 154, finding 7) that the Commissioners "wrongfully failed and neglected to sell said land, as required by them by law," which finding was and is unchallenged,

undisturbed and unreversed, it must be taken in Equity that it was done; that the Court, having found (Rec. 155, finding 8) that the defendant, Price, "was, ready, able and willing to comply with all the provisions of the law, which included the taking at the high bid, or appraisal, "and did demand * * that same (land) be sold" (which finding was unchallenged and remains undisturbed) put defendant, Price, in a position where the rule is that his rights cannot be prejudiced by the failure of the state's officers to do their sworn duty, and commit a felony in so doing.—Apx. "C", Sec. 17.

"Price's rights cannot be prejudiced, much less destroyed, by the neglect or failure of the School Land Commissioners to perform their duty."

Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424;

Lytle v. Arkansas, 9 How. 315, 13 L. Ed. 938, as reviewed and distinguished from *Frisbie v. Whitley*, 9 Wall, 187, 19 L. Ed. 668;

Ard v. Brandon, 156 U. S. 537, 39 L. Ed. 524;

Tarpey v. Madsen, 178 U. S. 215, 44 L. Ed. 1042;

Nelson v. Northern Pac. R. Co., 188 U. S. 108, 47 L. Ed. 406;

Payne v. New Mexico, 235 U. S. 367; 63 L. Ed. 680.

"The rule applicable in the present case, so analogous to the familiar doctrine so often announced

by this Court that 'a person who complies with all the requisites to entitle him to a patent for a particular lot or tract of land, that has been opened for sale, is to be regarded as the equitable owner thereof,' and the land is no longer open to location, or other disposition. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void."

Lytle v. Arkansas, 9 How. 314, 333, 13 L. Ed. 153;

Stark v. Starr, 6 Wall. 402, 417, 18 L. Ed. 925;

Witt v. Branson, 98 U. S. 118, 25 L. Ed. 86;

Witherspoon v. Duncan, 71 U. S. 210, 218, 18 L. Ed. 339, 342;

Deffenback v. Hawke, 115 U. S. 392, 29 L. Ed. 423;

Benson Min. & S. Co. v. Alta Min. Co., 145 U. S. 428, 36 L. Ed. 762;

St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 28 L. Ed. 872;

Payne v. Central Pac. R. Co., 255 U. S. 228, 65 L. Ed. 598;

Payne v. New Mexico, 255 U. S. 367, 65 L. Ed. 680;

Wyoming v. United States, 255 U. S. 489, 65 L. Ed. 742.

"The state stands in no different relation as a suitor than any individual. When the state comes into court to submit to judicial determination, it is not acting in its capacity as a sovereign, but as a litigant, claiming the same rights and bound by the

same rules as any of its citizens under similar circumstances."

- Lynch v. United States*, 13 Okla. 142, 73 Pac. 1097;
United States v. Bank, 15 Pet. 377;
Brent v. Bank of Washington, 35 U. S. 596;
United States v. Hughes, 11 How. 552;
United States v. Throckmorton, 98 U. S. 61;
United States v. Miner, 114 U. S. 223;
Folk v. United States, 233 U. S. 177, 147 C. C. A. 183;
United States v. Wynona & St. P. R. Co., 67 Fed. 948, 15 C. C. A. 108;
United States v. Northern Pac. R. Co., 95 Fed. 864; 37 C. C. A. 290;
United States v. Detroit Timber & Lbr. Co., 131 Fed. 668, 67 C. C. A. 1, 11. Affmd. in 200 U. S. 321, 56 L. Ed. 499;
United States v. Midway Northern Oil Co., 232 Fed. 631.

"The Commissioners of the Land Office were not principals, but mere agents of the law, hence they were without power to withhold from sale lands which were by law (of 1909) preemptorily ordered to sell."

- Lytle v. Arkansas*, 9 How. 315, 13 L. Ed. 938;
Deffenback v. Hawke, 115 U. S. 392, 29 L. Ed. 423;
Davis v. Wiebold, 139 U. S. 507, 35 L. Ed. 238;
Shaw v. Kellog, 170 U. S. 312, 42 L. Ed. 1050;
Burke v. Southern Pac. R. Co., 234 U. S. 1152, 1156.

On Constitutionality of Appendix "B".

We cannot refrain from touching on the constitutionality of the "deem" law (Appendix "B") from another point of view. It assumes that the Board may proceed by declaration, mere *fiat*, or expression of its opinion, or maybe desire, or neither; as in this case: "whereas, we have had offers * * * to place oil and gas bids", it may proceed on mere cupidity or interest, to "declare valuable for mineral purposes, and that same be segregated and withheld from sale." (Rec. 80, Ex. "C", August, 1915.) Thus without knowledge, information, evidence, notice to lessee, or hearing, the statute, or authority, assumes to give the power to the Board to "deem" one piece different from all others, and without the law, or all different from what the law contemplated, and all without the law. If Price, lessee, took anything by the Enabling Act, or Appendix "C", by virtue of his bringing himself within the terms of the Enabling Act, or Appendix "C", as lessee, then this "deeming" would take it away from him, if upheld. This, we think, would be deprivation of property without due process of law, and of equal protection, because his preference right, as lessee, dated from, and vested in 1902, at the first

lease. Such deeming in 1915 would deprive of this vested interest adjudged in *Noel v. Barrett*, 18 Okla. 304, and *Clark v. Frazier*, 177 Pac. 589 (Okla.). Also of his preference right of purchase that vested with the Enabling Act.

This "deem" statute, likewise vests, or attempts to vest legislative power in the Commissioners to set aside all laws, and to usurp the legislative function of declaring what shall be sold and what not, and when, and the manner, and to usurp the power exclusively vested in the Legislature by the Enabling Act and the State Constitution, Article XI, Section 4, to fix the regulations of sale. This is unconstitutional and void.

Betts v. Commissioners, 27 Okla. 64, 110
Pac. 766;

Haskrell v. Haydon, 33 Okla. 318; 126
Pac. 232.

Then either the Statute is void, or the authority of the Commissioners so exercised under the State is void as repugnant to the Enabling Act and the Constitution of Oklahoma and the United States.

This Statute likewise, in itself, attempts to invest the Commissioners with power to avoid, or escape, past conditions. If the rule expressed in *Shaw v. Kellogg*, 170 U. S. 312; 42 L. Ed. 1050, and

in *Work, Sec'y v. U. S.*, No. 258 in this court, decided May 28th, 1923, is law, then if the preference rights granted by the Enabling Act must be given effect, the defendant, Price, lessee, had his rights attached at that time, (1906) and in the conditions then known. If this be true, then no subsequent "deeming" or declaration, or resolution, could supplant the right or withdraw the land from its subjection.

United States v. Iron, Silver Mining Company, 128 U. S. 673;
Wyoming v. United States, 255 U. S. 489;
Deffenback v. Hawke, 115 U. S. 393;
Davis v. Wiebold, 139 U. S. 507;
Work v. United States, hereinafter considered.

In the Wyoming case, this Court said:

"The validity of the selection should be determined as of the time when it is made, that is, according to the conditions then existing," to-wit: 1906, or 1909, when Price purchased his right.

Therefore, the validity of Price's right should be determined as of the time of his selection "according to the conditions then existing." Now the "time of selection," under our Enabling Act, would seem to be as to those who were then lessees, as the date of the Enabling Act; as to those subsequently selecting, as of the date they did so. Price con-

tracted to buy out a previous lessee in 1908, *after* the Enabling Act passed in 1906, and in reliance thereon, and in reliance on his predecessor's rights, initiated in 1902, and paid out and took assignment in 1909 (after passage of sales statute 1909,) with the approval of the Commissioners; the State, by Constitution Article XI, Section 1, its acceptance, and by the Sales Act, (Appendix "C", 1909) confirmed his expectations, and his right.

It would not seem right then that any subsequent Commissioners' "deeming" the land valuable for oil (made in 1915) or any subsequent discovery of oil in 1920, could avoid his rights or change the "conditions then existing," under which he took.

Green v. Robinson, 109 Tex. 367, 210 S. W. 498.

The "deem" Act, (Appendix "B") is repugnant to the Enabling Act (and the Constitution of Oklahoma, Article XI, Section 4, also) because the Enabling Act (and Oklahoma Constitution) only permit the land to be "sold", not leased. The power to sell does not include the power to lease for mineral purposes, to barter, to trade, or do otherwise than "sell".

Thomason v. Upshur Co., 211 S. W. 325; (Tex.)

Dallas Co. v. The Club Co., 66 S. W. 294;
95 Tex. 200, and cases cited therein;
Pulliam v. Runnells Co., 79 Tex. 363, 15
S. W. 277.

This alleged Magnolia lease and Statute (Appendix "B") is an attempted conveyance of a "part" of the land "for a division of the proceeds other than money" and the easement, use and permission to destroy the land, for no consideration; strictly as condemned by the Court in the Thomason case, the Dallas Company case, the Green case, *supra*. Such power is not in the Legislature. That a lease is an "alienation" was early held by Oklahoma in *Eldred v. Okmulgee*, 22 Okla. 742, as already cited.

On the Theory that Lessee held by Fee Farm, Rent.

There is another view of the Lessee's rights, founded in ancient law, that adds to the specific right granted by the Enabling Act and the Sales Statute, and which lead the Congress, we think, to its effort to expressly protect the lessee.

The Rules and Regulations promulgated (Rec. 134, Rule 8) were held in *Noel v. Barrett*, 18 Okla. 304, adjudged in territorial times, to give the lessee Barrett a perpetual right of re-lease; the court said "Barrett leased the land out of which the con-

troversy grew, and under the rules and regulations of the Department he, so long as he kept the rentals paid, was the possessor of a preference right to continue leasehold upon such terms as the board should from time to time impose. This preference right is a valuable property "right," etc. etc. was "subject of sale and purchase same as titles to other lands" (at p. 306). Now this being adjudged and settled and a rule of property in the Territory and State, there was no right of reverter in the lessor. Lessee's obligation was not under this law to turn back the land, but he could hold it as long as he complied with his contract of payment of rentals, which were to be and were fixed by law, and were fixed at 4% on appraisal, and that only, and not the term, was subject of change.

These rules were enacted as a part of the act of May 4, 1894, 28 St. at L. 71 (quoted in record 176) and had the force and effect of law; so held in *Betts v. Commissioners*, 27 Okla. 64 (at p. 73). The evident purpose and legal effect, was to give and secure to the lessee a permanent home, conditional only on his keeping up his rental, the expected income to the funds.

This condition of the law, and status of the lessee, was carried over by the Enabling Act, and the

Constitution of the State, under the rule in *Trapp v. Cook Construction Co.*, 24 Okla. 850, *supra*, and indeed no effort has been made to change it, except by the "deem" Statute, Apx. "B".

The rate of rental was re-enacted at 4% in Statute of 1909, Ch. 28, which reads, in Sec. 11, "The rental price for said land shall be fixed at four (4) per centum * * * on value * * * as returned by appraiser of the year 1908." It then provided for re-appraisal each 5th and 10th year, but left no condition of future change of rate. So to all intents both elements were fixed; and the lessee had a permanent contract of tenure, with right of re-entry only for default by lessee by non-payment, waste, etc. But this was not reversion, in the meaning of the law. It seems to be considered that such a grant is "an executory devise or a dedication of property to a public use."

Vincennes v. Indiana, 14 How. 268.

This does not carry right of re-version in the United States but the right of recovery of an income to the use of the fund to which the income was dedicated, in this case "charity and public buildings, and penal institutions".

The lessee, having an estate subject of bargain and sale had a descendible interest and inheritable estate.

The leading case we think, on this subject is, *De Peyster v. Michael*, 57 Am. Dec. 470, (6 N. Y. (2 Selden) 467) where, in Am. Dec., a full and able discussion is found with note of extensive use following; therein is distinguished "re-entry for non-payment" and "reversion". "Re-entry" being "mere right or *chose in action*" causing "forfeiture" and not a "reverter" and it is stated that where "property is held on condition all the attributes and incidents of absolute property belong to it until condition is broken". Here then the lessee had a "Fee" or absolute right of indeterminate use while the "^{Legal title}~~property~~" was in an other—the United States; (see Bouvier "Fee") 261, Com. 106; Co. Litt. 7b; 3 Kent 514; or he held as fee farm rent; "The rent reserved on granting a fee farm". Hence, a lease, and re-lease as of right, terminable only by Act of lessee, and coupled with the "preference right to buy" over all others, carried about all there was of this land except the rent reserved: 4% on valuation. "A lease and re-lease have the joint operation of a single conveyance."

2 Bl. Com. 339; 4 Kent Com. 482; Co. Litt. 207.

To have in one's self the power of alienation, as adjudged in the Noel case, is to have property. To have that secure against the world, and enforce-

able by compliance with the conditions, and not dependent upon the act of another, is to have perpetual property—it is all one can have.

We cite the Court to De Peyster case, specifically to page 478 of the 57 Am. Dec. for discussion.

The Congress having parted with the continuous right of possession, dependent only on condition of paying rent, is "letting lands to farm in fee simple instead of the usual methods for life or for years;" 2 Bl. Com. 43, Hargraves notes, 143b, note 5. That they "are estates of inheritance; * * estates in fee simple." *De Peyster v. Michael, supra*, at page 478-479. The lessee holding such an estate was grossly invaded by the Statute, (Appendix "B"), and by the action of the Commissioners in executing the oil and gas lease (Record 14) over his head; and by the operation thereof, under the State's protection, and by the decision of the Supreme Court herein; all in violation, impairment, and destruction of his rights under the Acts of Congress and the Constitution of the United States.

Price's rights are not, however, to be understood as urged by us, wholly dependent on the rule of the DePeyster case. We are impressed with its application here, and its soundness, and it seems

a logical interpretation of the Rules and the Acts of Congress, and adjudications, in this matter. It is not probably what the profession of the present day would readily accept, and it may not have been the realization of the Congress as to the effect of its various grants; but if it is a correct view, it adds additional reason why Price should recover.

**On Review of Movants' Brief.
Apportionment and Disposal.**

Movants in their brief, page 6, quote a portion of Section 8 of the Enabling Act to the effect that Section 33 shall be "apportioned" and "disposed of" as the Legislature "may prescribe" and argue therefrom that:

"This Section, of course, gave plenary power to the State," to do with the lands as it pleased, regardless of the preference rights granted in sec. 9 and 10.

Had this Section 8 stood alone, and Section 10 of the Enabling Act not been enacted, counsel's statement would probably not be questioned, and this suit not existing. But Congress enacted Section 10, too, of the Enabling Act, and fastened the conditions and limitations on the State as follows:

(a) Granting preference right to purchase to the lessee.

(b) As to acreage 160, this being the leasehold acreage.

(c) As to appraisal, by disinterested appraiser.

(d) As to appraisal, by appraiser from other counties.

(e) As to appraisal, to be designated by legislature.

(f) As to appraisal, separating improvements from land.

(g) As to minimum bid being equal to appraisal.

(h) As to leasing, for not more than five year periods under "existing rules".

These "limitations" on its authority the State accepted. (Constitution of Oklahoma, Article XI, Section 1.) So it would appear that the State's "plenary power" lacked about nine material points of being "plenary" according to our dictionary.

As to the "apportionment", the Sections 33 were for "charitable, public buildings, and penal institutions"; to these three classes of fund; we do

not question the State's power as to apportionment, of the fund to these three purposes. We have no interest. But as to the doctrine of "plenary" power to sell as it pleased, and to whom it pleased, or to carve out a separate estate in another, Section 10 of the Enabling Act mutilated that doctrine.

In movant's brief, page 13, there is suggestion that the phrases, when referring to the land "in its entirety", and "all thereof" refer to the "acreage", the full 160 acres, etc. No suggestion of this kind has arisen because the acreage has never been questioned. By "entirety" and "whole thereof" we mean from the "top of the ground to the center of the earth". It being our language and our contention, we have the right to define it.

On said page 13, it is further asserted that Price should have exercised his preference to buy the oil lease immediately after the close of the oil lease sale, or he is barred from asserting any such right. This is another "*non sequitur*". Price denies the Commissioners' rights to make the oil and gas lease; about this there seems no reasonable ground for doubt. He is in no position then to take an oil lease on what he claims as his own land, or on land which he has a right to acquire and own.

They also attempt to shift the burden. The Enabling Act, Section 10, requires of the Legislature that the lessee "be given" the preference right to purchase, "under the rules and regulations as the Legislature may prescribe". The Rules and Regulations prescribed for oil leases (Appendix "B") may be searched in vain for compliance therewith. It neither gives "nor recognizes any preference. None has been extended. And this is but another reason why Appendix "B" is repugnant to Section 10 of the Enabling Act and the Constitution of the United States, and is void.

On the other hand, *if* he had a preference right to buy the land; and *if* the State had a right to divide it up and sell the oil and gas at one time, and the sand and rock at another, and the water and timber at another, and so on *ad infinitum*, the preference right must necessarily attach to each component as it attached to the whole land; and under Section 10 of the Enabling Act, *if* the Legislature has the power to provide for such conduct, which we always deny, then the Statute so providing would have to "give the lessee" at the time a chance and right to exercise his option. This Appendix "B" did not do, and is void for the same reasons above asserted.

But strange to say, movants, on page 14, lines 19 and 22, of their brief assert that "sale" and "sold", as used in Section 10 of the Enabling Act, do not refer to "mineral leasing". We have urged this all along, and that, therefore, the State having only power to sell Sections 33, under Section 10 of the Enabling Act, had no power to "mineral lease"; and that the alleged lease (Record 14) is therefore void, and the Statute (Appendix "B"), attempting to authorize it, is void. We are glad to have convinced them.

However, steering clear of Scylla, they are caught in Charybdis, because they say Section 8 of the Enabling Act provides that "this land shall *not* be sold", (movants' brief, page 14, line 26). This unwarranted statement arouses attention at once, but attention only is required to refute it. There is no ground for the assertion.

All this time the Sale Statute of 1909 (Appendix "C") was in force specifically ordering the sale of Section 33, and specifically granting Price the right to have it sold and his situation in life settled and defined; and granting him right to buy, in preference to all others, and in the absence of all others, at appraisal. So the Legislature for the State did not consider that Section 8, Enabling Act, forbid its sale, and it did not.

And again, be it remembered: The Legislature in 1909 specifically ordered all Sections 33 sold, fixing immediate time (Appendix "C", Sections 1 and 15). This quarter was not excepted, nor was it declared by the Legislature reserved as "valuable for minerals". The Legislature not having so reserved it, no one else could. The power to reserve specific lands until 1915 expressed in Section 8 of the Enabling Act was in the Legislature only, for it alone had the power to elect to sell or not. It was a power of law. The lessee's rights were too sacred to be intrusted to other determination. We think this "are valuable for minerals" must be considered as "known minerals", not subsequently discovered, and is governed in law and act by the rules expressed in *Colorado Coal & I. Co. v. United States*, 123 U. S. 307; *United States v. Iron Silver Mining Co.*, 128 U. S. 673; *Shaw v. Kellogg*, 170 U. S. 312. It is so expressed in Apx. "C", Sec. 1, last line.

Some other assertions in movant's brief are subject to criticism, we think. They assert, brief page 16, regarding our Supreme Court opinion: "Whether the Court was right in this construction is not a question open in this court." The denial of a right claimed under the Constitution of the United States or Act of Congress, is reviewable in

this Court, however carefully the denial may be couched in terms of "construction" for the purpose of avoiding review.

Ward v. Love Co., Oklahoma, 253 U. S. 17, 64 L. Ed. 751 and cases reviewed and cited herein.

They assert: "We have a construction of the Act of Congress which places its fee title in the State", etc., but it is by the State Court. This likewise does not oust this Court of jurisdiction, carefully conferred upon it, to uphold, and preserve constitutional government. See cases last above cited, *supra*. They assert such construction of the Act of Congress by our State Court gave the State a right of "leasing of all of the lands after January 1st, 1915, in any form in which the State might desire". (Movants' brief, page 16, last line, and 17, top.) This we think, does the opinion an injustice. We can find no authority for such statement. If, however, it does so "construe" the Enabling Act, we assert it presents stronger grounds to review such "construction" and preserve the Act of Congress, and again remind the State Court, as in the *Ward* case, that they cannot oust this Court by pretense of construction. (See cases herein, p. 46, *supra*.) Besides, a state Statute is not viewed as has been construed or acted under, but by what may be done under it. *Noble v. Douglass*, 274 Fed. 672.

Movants assert (page 18) that the decision of the Oklahoma Supreme Court is "construction of State law" and final. We claimed our rights under the Act of Congress of 1894, and 1906 (Enabling Act); this cannot be denied or avoided by any "construction" of state law, however diligent the effort. If the statement is true then the State Supreme Court ignored our claim and the Acts of Congress. We claimed the right to have this land sold, and the right to buy it, and that we had bought it under "Appendix 'C'"; that it was a right protected by the Constitution of the United States that could not be taken away by the Commissioners "deem" in 1915, or by any forced "construction" which sought to avoid it. Such a "construction" as they claim would be a denial of equal protection of the law and of due process. This claim cannot be avoided by "construing" the State law; however construed to "deny" the claim, it denies it, and that denial is given the right of review here. See cases above.

Through all of movants' brief, the distinction between "the State", and the Commissioners, or agent of the State, is lost sight of. We feel sure that this Court will notice the confusion of terms without being specifically pointed out.

In movants' brief, page 15, it is further asserted that the "absolute fee simple title became vested

in the State". Thus impairing the "preference right of purchase," granted to the lessee; in fact wholly overriding it. But, it will be seen that by the same grant, and by the same sections of the statute, a preference right to purchase that title became vested in the lessee. Then the State did not take a "fee simple", and counsels' claim is exaggerated because it accepted under the "conditions and limitations" of the Enabling Act by which it took (Const. of Okla., Article XI, Section 1, *supra*); and when the State elected to sell and came to sell, it so recognized and ordered the sale, and sold, "subject to such limitations, exceptions, conditions, rules, regulations and instructions as provided in the Enabling Act" (Appendix "C", Section 1), of which one was the preference right of the lessee to purchase.

The State had no higher title than the lessee, for both came by the same Act of Congress, and the State took subject to the "right" of the lessee. They ran concurrently.

We are not without precedent. The Chickasaw and Choctaw tribes had a "fee simple" in their lands, but Congress as their guardian allowed them to be leased; and under Act of February 19, 1912, (3 Stat. 67, Chap. 46), the lessee was granted,

by Section 2, a preference right of purchase. The Secretary of the Interior in a recent case was compelled by mandamus to execute the deeds in recognition of this right. *Work, Sec'y v. United States, ex rel McAlester-Edwards Coal Co.*, No. 258, decided May 21, 1923.

The provisions of Section 8 of the Enabling Act are to be read, and they do read, consistently with the provisions of Section 10. Section 7 *grants* Sections 16 and 36, and Section 8 grants Sections 13 and 33, each, for its purpose. Section 8 then provides that "Where any part of the lands granted by this act * * *are* valuable for minerals, which terms shall also include gas and oil, such lands shall not be sold by the said State prior to January first nineteen hundred and fifteen." But "may be leased for periods not exceeding five years".

Section 9 provides for permission to sell Section 16 and 36, or lease in ten year periods and not more. Section 10 provides permission to sell Sections 13 and 33, or lease in five year periods, and not more.

Both sections granted preference right of purchase to lessee as of right—no conditions, "ifs", or "ands" about it—in "commanding language" The lands valuable for minerals postponed to 1915 could

only be known minerals, for any other would be "conjectural" mineral, which could as well be one tract as another; or as well one tract, many tracts, all tracts, or none; dependent alone on the purpose, interest, or profit of the "conjector". The language of the Enabling Act "was special, and exact precluding any supplementary or aiding sense," to use the language of this Court in *Ervien* case, 251 U. S. 41.

There is nothing else for the law to work upon except that which is "known". It must stop at the imaginary, the conjectural, the supposed, or the desired. Thus the Sales Act (Appendix "C") reserved from its commanding language "known" mineral land only, until 1915 (Section 1, last three lines). All other was ordered for immediate sale. (Section 15.) This is definite and certain and follows the principles laid down in *Shaw v. Kellog*, and that line of cases, (*supra*), and *Green v. Robinson*, 109 Tex. 367, 210 S. W. 498, that certainty must result from law, not uncertainty.

But the "deem" or "segregation" Act (Appendix "B"), authorized, or attempted to authorize the Commissioners on mere "deeming" land to be valuable,—by mere resolution, without knowledge, finding, or fact known of any kind,—to withhold any part or all the lands granted by the Enabling Act,

from the preference right of purchase granted as of right by Sections 9 and 10 of the Enabling Act, thereby wholly nullifying the grant as to that right, or making it capable of so doing. This, then, is the very astounding position of the State and the Magnolia Petroleum Company in this case.

We are now met (movants' brief, page 16) with the pretension that this is the State's "construction" of the Act of Congress (which said pretended "construction" overlooks the grant of purchase right, by Sections 9 and 10); also that the "remainder of the opinion" was "merely construction" of State Statutes, and therefore not reviewable in this court. The protection claimed from "construction" is here much stretched. It requires no "construction" to see in Sections 9 and 10 of the Enabling Act a permission to the State to sell; and a grant of preference right of purchase, if sold.

It did not require any "construction" to find from Appendix "C" that the State had elected to sell, and sold, and ordered the Commissioners to carry it out—execute it, in most "commanding language" (Section 1 and Section 17), and respected, and re-granted the preference right of purchase (Section 3b) and reserved from its effect ^{until after 1915} only "known" mineral land—no others. (Section 1.)

This Act, its terms, effects, rights granted, and duties imposed, was, it seems wholly ignored in the "opinion". Was this "construction"? The claim of "construction" when used to avoid the effect of a Statute, is often overdone, as in *Ward v. Love County, Okla., supra*. The latest instance, probably, was in *Work, Secretary, v. United States, ex rel, McAlester-Edwards Coal Co., supra*, No. 258, in which mandate issued to the Secretary of the Interior, because he had construed himself from under the Statute. This Court quoted from *Lane v. Hogland*, 244 U. S. 174, and *Roberts v. United States*, 176 U. S. 221, 231, to which we refer, for proper rules of construction.

In the Work opinion, we refer especially here to the Paragraph 2, (in col. 1, page 583, Supreme Court Reporter), wherein by this Court is said "We think the preference right of relator, conferred by Section 4, Act of 1918, was not to be left to the legal discretion of the Secretary in the construction of that Act. There are no words to qualify that which the lessee has as a right granted by the Statute, or to vest in the Secretary the final discretion to determine or define that right."

So here, the lessee of this land had, as a right granted by Statute (Enabling Act), a preference

right to buy this land. There was no discretion vested in any one to determine or define that right. The lessee got it by as high a title as the State,—by the same one, the Enabling Act. “There are no words to qualify,” the rights granted, or to empower any one to “determine” or “define” such rights. It was, and is, his, and no alleged “construction” can be invoked, thereby to deny the right claimed. No amount of “construction” can take out of the Statute, Appendix “C”, the election, by the State, to sell this land; its order and command to sell; the terms fixed; the time when it must be sold; the right granted the lessee, *first*, to have it sold, *second*, to buy at the high bid, or appraisal if no bid; the right to have his status determined; whether he was a temporary lessee, or permanent owner. These were valuable rights, expressly granted, with none to review, or define, and the rights once granted, were irrevocable (Dartmouth College case). To calmly ignore this Statute and its effect is not to “construe” it. The defendant’s rights were denied no matter what the excuse given.

**On Lands Valuable for Mineral Mentioned in
Enabling Act, Sec. 8.**

If, as contended by defendants in error, Price, under the Enabling Act, took a right to buy only the surface, or had only surface rights, and *if* the Legislature could provide that the Commissioners can deem any public land "valuable for minerals, gas or oil," and withdraw it from the law, then it may with equal force be urged by the State that any minerals in the land, that is, any other minerals, subsequently discovered, or supposed to exist, or claimed to exist, belonged to the State, and could be disposed of by it to anyone, at any time it saw fit; and the State could, "reserve" at any time, even subsequent to surface rights sale, assert ownership thereof under this law. It seems to us that the very assertion of this proposition demonstrates the unsoundness of the position of the Defendants in Error taken by them at the inception of this litigation, and since,

The State of Texas owned its lands, as the United States owned these. It provided for their sale by Act of April 12, 1883, which provided: "The minerals on all lands sold or leased under this Act are reserved by the State for the use of the fund to which the land now belongs." Subsequently, legislation passed after sale, attempted to authorize ex-

ploration of these reserved minerals. The Court held that they passed with the land unless "known" at the time the land was alienated, in *Green v. Robinson*, 210 S. W. 498; 109 Tex. 367, following this Court in

Deffenback v. Hawke, 115 U. S. 392;
Shaw v. Kellog, 170 U. S. 312, and others
cited therein.

From these decisions it is clear that, as to minerals, there is a clear distinction as to the effect of law relating to public lands, between minerals "known", and mere "suspected" or "deemed" or "supposed to exist", minerals.

In *Shaw v. Kellog*, 170 U. S. 312, this Court said: "We say lands known to contain minerals, for it can not be that Congress intended that the grant should be rendered nugatory by any future discoveries of minerals", and further, "it would be an insult to the good faith of Congress to suppose that it did not intend that the title, when it passed, should pass absolutely, and not contingently upon subsequent discoveries." ④

Then when Congress, in Section 10 of the Enabling Act, gave to lessees the preference right to purchase, it would equally, we believe, be an insult to the good faith of Congress to assert that thereby it meant only the preference right to purchase the

“surface right”—which, itself, would be subject to destruction at the “subsequent discovery of mineral”, in future years.

And when Congress, in Section 8 of the Enabling Act, said: “Where any part of the lands granted by this Act *are valuable* for minerals, oil and gas, they should not be sold before 1915,” and by Section 10 attached the preference right of purchase to the lessees of all Sections 13 and 33, it had two effects, if any: *first*, to attach the preference right to the land and all of its parts and attributes; and *second*, it postponed the sale of only the “known” mineral lands; it did not deny the preference right to the lands subject to Section 8, but only fixed a nearest date at which they could be sold. It went no further.

The Legislature of the State took this view of it, also, evidently following *Shaw v. Kellog*, *supra*, because in the Sales Act (Appendix “C”) it will be noted that in Section 1, in the last three lines, it is “Provided further that where any part of the above enumerated and described lands are KNOWN to be valuable for minerals, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915”.

This land was not *known* to be valuable for oil or gas until 1920, (Record 155, finding 11). So it follows that this land was *not* to be postponed as to sale by Section 8 of the Enabling Act until January 1, 1915. On the contrary, it was included and covered by Sales Statute, (Appendix "C"); and, having been appraised January, 1909, (Record 156, finding 6), as not "known" mineral land, and, the lease period having expired January 1, 1909, and only extended by the Legislature to December 31, 1909, (Record —), it at once was a subject of sale under Appendix "C", Section 15.

Hence, we assert, in view of the above decisions, that the Commissioners had no power to withhold the land from sale on January 11, 1911, in Stephens County; and that when Price appeared there and offered to take it at appraisal, it passed under the law to him as found by the Trial Court (Record 155, finding 8 and 10, and Decree 5, Record 157). He did all the law required him to do. Authorities, *supra* ~~2~~ 97

This also precludes any thought that the Commissioners could "deem" any land valuable for minerals, and then withdraw it from the effect of the Enabling Act, and Sales Statute (Appendix "C") which postponed the sale of only "known" mineral lands.

As we understand *Shaw v. Kellog*, and the other cases on this point, Congress never has, and probably can not reserve the unknown minerals in lands alienated, no matter how definitely attempted; but is limited to "known" minerals. If it could not do so, and Texas could not do so, as decided in *Green v. Robinson*, then Oklahoma could not do so as to these Trust lands, and the contention of Defendants in Error is futile.

Effect of the Written Lease Change.

It is contended by Plaintiff, and mentioned in the "opinion" that the lease "contract" (the periodical instrument issued every term expiration), was so written by the Secretary of the Commissioners that the lessee (who signed by mark) contracted away his preference right to buy the land, and all of it, granted by the Enabling Act, and the Sale Statute of 1909. (Apx. "C".) Perhaps they have not in mind these propositions:

(1) The lessee "has no voice in the language of the instrument. The terms are not open to negotiation or agreement. He must abide the action of those whose duty and responsibility is fixed by law. The land officers are not principals, but agents, of the law, and must heed only its will"—not their own schemes, and desires.

Burke v. S. Pac. Ry. Co., 234 U. S. 699;
58 L. Ed. 1527; and cases cited.
Walpole v. St. Bd. Land Comm'rs of
Colo., 163 Pac. 848, 62 Colo. 554.

—wherein it is said the Board is a “mere agent, with duty to do not less, and power to do no more * * * than is provided.” The lease clerk most likely is governed by the same law.

“As the law does not vest the Land Board with authority to make any reservation * * the one attempted here is a nullity and without effect for any purpose.”

Walpole v. St. Bd., 163 Pac. 848; 62 Colo. 554.

In view of this state of the law we cannot see that much weight attends movants' brief, pages 10 and 11, on this and kindred subjects. The Oklahoma Court by Justice Williams, in *Betts v. The Commissioners*, 27 Okla. 64, 110 Pac. 766, held the Legislature strictly to account under the law and denied the Commissioners any power other than to execute the law, and in *Haskell v. Hayden*, 33 Okla. 518, 126 Pac. 232, held the preference right limitations of the Enabling Act enforceable and the rule and regulation power to be legislative only, not to be exercised by the Commissioners. The contractual power, therefore or fixation by the terms, and rights lies in the Legislature only, subject to the Enabling Act, and

not in the Board, and not in the "Secretary of the Board", or the "form" of the lease.

(2) Price cannot read or write, (Rec. 108, bottom).

(3) There was no consideration moving to Price to renounce his preference right of purchase granted by the Enabling Act.

(4) This pretended "lease" bears date of January, 1913 (Rec. 23) at which time the Commissioners had *no authority* to lease said land, as against the positive mandate of the sales statute of 1909, (Appendix "C"). Their only power at that time over Section 33 was to *sell* as "each" then outstanding period expired. (Appendix "C", Section 15) under the appraisal of 1908 (Appendix "C", Section 4). This period as to this land expired December 31, 1909.

It was appraised in January, 1909 (Rec. 97-8-9, 100), and appraisal approved March 25, 1909, (Rec. 101). The original lease covering this land executed June 8, 1902, ran until January 1, 1905, (Rec. 42); the next one from January 1, 1905, to January 1, 1908, (Rec. 45); the next one by House Bill 414 of Session Laws to January 1, 1909, (Rec. 48-9, Ex-
"C"), which made this land subject to sale under

the sale Statute of March 2, 1909 (Appendix "C"), at that time. It was again extended by executive order and legislative action to December 31, 1909 (Rec. 50-1, Exhibit "E"), but the power to lease, by the Commissioners, was never again enacted.

In this state of the law, under the Enabling Act and Sales Act of March 2, 1909 (Appendix "C"), Price bought out prior lessee, and took assignment in October, 1909, (Rec. 51-52, Exhibit "F"). The other three-quarters of this Section 33, and all other granted lands in the county, were offered and sold to the lessees at appraisal (Stipulation Paragraph 9, Record 117, (a) to (g) Record 118), in January 1, 1911, hereinbefore shown. At that sale Price demanded his land at appraisal, and we think that in law it was then sold, and the Trial Court so found (Record 155.) There is no legal reason why this was not sold, therefore, and no authority of law whereby the Commissioners could pretend to lease it after Appendix "C" became law, March 2, 1909; that the Statute gave no power to lease—its order was to "sell"—mandatory and ultimate, and therefore, in 1913, the Secretary to the Commissioners of Oklahoma could not change, by pretended "lease" instrument, the legal status of Price.

On the Opinion of the Supreme Court of Oklahoma.

We approach a discussion of the opinion of our State Supreme Court with much hesitation, but there are some parts thereof that we think draw attention.

In Syllabus I (Rec. 170), it is stated that Act of Congress, March 3, 1891, 26 St. at L. 1043, does not provide for preference right of re-lease "nor do any subsequent acts" "prior to the Enabling Act", etc. This, we think erroneous.

The rules (Rec. 133, 134) do so provide, and Congress ratified and affirmed and adopted them in the Act of May 4, 1894, 28 St. at L. 71. It was so adjudicated in cases cited the court, to-wit:

Noel v. Barrett, 18 Okla. 304;

Clark v. Frazier, 177 Pac. 589 (Okla.).

So the statement of the Court seems unsupported; this Act was cited in brief, and quoted by the Court in its "Opinion" (Rec. 176); but it seems to have overlooked the effect of the Act, the rules themselves, and above decisions.

These rules were not amended by the Legislature, but the first State session legislatively extended existing leases to January 1, 1909, (Appendix

“A”, Sec. 1), and the preference right has always been preserved. The Enabling Act carried over the “existing rules”.

In Syllabus 2, the “moving purpose” of the reservations is expressed “for public buildings” (as to Sec. 33). But this is a “*non-sequitur*”, to use the Federal Court’s expression in *Noble v. Douglass*, 274 Fed. 672; while the “moving” purpose may have been to provide a building fund, the purpose was, so Congress thought, best accomplished by giving security of tenure to lessee, by preference right of release, and of purchase, thus increasing improvements, increasing revenue from bettering tenancy, and improving citizenship; this is evidenced in the record by the value and character of improvements, to-wit: Two story house, barns, wells, fences, orchard of 800 trees (Rec. 103), value \$1290.00 (Rec. 100). It marks the difference between “chain harness and shuck collar tenantry,” and permanent husbandry. Even if the Court’s statement be accepted, the Enabling Act was before statehood and soon enough for Congress to appreciate the lessee’s efforts, and secure him in his preference rights. The Court should have respected the will of Congress so expressed, even if considered tardy, which it was not. Sec. 10 of the Enabling Act (*supra*) expressly

extends the "existing rules" for leasing, which rules carried the preference right affirmed in *Noel v. Barrett*, 18 Okla. 304. We think the State could not impair this right afterwards because protected by the Constitution of the United States, Article 1, Sec. 10.

Syllabus 3: What has been said above meets the statements of Syllabus 3, with equal force.

In Syllabus 4, the Court says the Enabling Act and the Constitution of Oklahoma constituted a compact which "superseded all previous acts, rules and regulations in conflict therewith". There being none in conflict, we fail to see the sequence of this statement. We urged, and now urge that the Enabling Act expressly preserved and carried forward the preference right acquired under the rules and regulations promulgated, and extended the preference rights to lease, re-lease and to purchase in event of sale. See Enabling Act, Sec. 10 *supra*, and Constitution of Oklahoma, Article XI, Sec. 1, for its acceptance.

Syllabi 5, 6, and 7 relate to compelling the State to sell. A straw man, set up, and knocked down. Such proposition was never urged. We urged that the Enabling Act permitted a sale (Sec. 10), and the Constitution of Oklahoma permitted a sale (Art.

II, Sec. 4), and the Legislature ordered, and in fact and in law opened to sale, or sold the lands, and granted the right of purchase to lessee on certain terms expressed in the Sales Statute (Appendix “C”). After that Statute the lessee has but to comply therewith, and the Officers are by law compelled to carry out the Act, and failing so to do, the lessee’s rights are not prejudiced thereby. The Trial Court so found and so decreed, following this court in *Lytle v. Arkansas*, 9 How. 314, which were cited to the Supreme Court but by it overlooked. So these Syllabi are foreign to the case.

Syllabus 8 is incorrect. The phrase, “terms of his lease contract”, is misleading. As we read the law where officers are authorized to make a lease or other official contract, the law constitutes the “terms of the lease”; the officers can give mere formal expression thereof, but cannot change, or withhold rights therefrom having no discretion, no bargaining power, and no power to alter the terms of the law. We relied upon and cited:

Burke v. So. Pac. Ry., 234 U. S. 699;
Walpole v. St. Bd. Land Comm’rs. of
Colo., 163 Pac. 848.
See, also, *supra* p. ~~39~~ and ~~40~~, **126-129**

but the court apparently overlooked them, and the rule, “There can be no consideration for changing

the law in official dealings with the citizen". The Commissioners and their Secretary had no power to "fix terms" with lessees or change the law :

Betts v. Comm'rs., 27 Okla. 64, 110 Pac. 766;

Haskell v. Hayden, 33 Okla. 518, (at 520-521), 126 Pac. 232.

Syllabus 9: It is also a "*non-sequitur*", if the Sales Statute (Appendix "C") shows, as we contend, that the State by it "elected" to sell the land; by its clear language, it not only expressed "election" to sell the land (Sec. 1) but fixed all the terms, time, and price subject to the Enabling Act, and re-granted the lessee preference right over all others to buy at that time, and on those terms (Sec. 3b); and expressly granted the lessee right to buy at the State's appraisal, even if no person bid (Sec. 11, last sentence); and such sale was *not* limited, as the court limited it, to "agricultural" lease, without safety of possession, or right of possession, but extended to *all* the land, contents and possession, without restriction or limitation; it carried the land and all its incidents of ownership.

The Statute expressed "election" to sell, until this decision abrogated it. We think the Court merely overlooked the Statute. We are confirmed in this thought by the fact that the long opinion of

the Court cites not the Statute, or any provision thereof, other than to say it does not "violate any of the conditions imposed by the grant aforesaid" (Rec. 184, top), referring to the Enabling Act. No one has contended that it did. But if it did *not* violate the Enabling Act, some effect must, or should be given its terms which the Court did not refer to, quote, discuss or apparently consider but ignored on the point raised;—that it did order sale, and for the State, grant to lessees the right of purchase; and concurrently with the Enabling Act, granted preference right of purchase of the whole of the land. So, for the purpose of this case, the Statute was, like the Enabling Act, wholly overlooked as to effect, and no one of the cases cited to the Court, and now cited this Court, were referred to or discussed. The opinion seems to be one of original impression.

But the opinion says, (Rec. 183, par. 3), "should it (the State) *sell* any of them, or lease any of them (lands) such sale, or lease must not violate the conditions of the grant." To this we give full assent. But one of the "conditions of the grant" was that if leased, it should be leased "under existing rules" which carried a preference right of release (18 Okla. 304); and, if sold, the preference right of purchase must be extended to the lessee,

Price. This is violated by the oil lease Statute (Apex "B"), and the oil lease (Rec. 14), because neither extended Price his preference right; and, since the oil lease gave the right to take contents of the land, and occupy and possess it and destroy everything that interfered, and take the water, timber, and stone necessary for "five years, and as long thereafter as oil or gas, or either of them may be found in paying quantities", which might be forever, or of unlimited duration—

People v. Bell, 237 Ill. 332;

Bruner v. Hicks, 230 Ill. 536;

Both cited in *Guffey v. Smith*, 237 U. S. 101, at page 113,

—it is clear that never thereafter could Price enjoy his "preference right of purchase" of the land granted him by the Enabling Act, Sec. 10, until this oil and gas conveyance was removed. If, on the other hand, the oil lease was a sale or alienation, as held in

Eldred v. Okmulgee, 22 Okla. 742;

Hoyt v. Fixico, — Okla. — (not officially published); 175 Pac. 517;

Guffey v. Smith, 237 U. S. 101;

United States v. Noble, 237 U. S. 74;

Texas Co. v. Dougherty, 107 Tex. 226,

then, it is clear that Price could never thereafter enjoy his right of purchase, because it had been already sold, and the valuable contents taken and the

surface, and the ability to use the surface destroyed; because a drilled out oil land is destroyed for all purposes of man.

It is clear, therefore, that the opinion held out words of hope in virtuous language, and delivered destruction in its decision and order.

The opinion refers to the oil lease segregation Statute (Apx. "B"), and says the Commissioners "duly segregated the land in question from sale because of the oil and gas '*supposed*' to exist therein", and that the results "conclusively warranted" it (Rec. 184, Par. 3). We did not come to try the "warrant" of the Commissioners' judgment, in profit, but only their warrant in Law.

This "segregation Statute" was passed March 2, 1908 (Apx. "B"). The Sale Statute was passed March 2, 1909, which ordered this land "sold" (Apx. "C"), leaving no loophole for segregation, or withdrawal, except for "known" mineral (Sec. 1). The two Statutes cannot co-exist. If the Commissioners obey the order to sell, except where "known" minerals they could not "duly segregate from sale", because of oil and gas "supposed to exist therein". They cannot do both, and language is futile that so says. Again, they did not "duly segregate from sale" until 1915, long after the sale

occurred in Stephens County in 1911. Again, they cannot "duly segregate from sale" in 1915 after the sale Statute of 1909 (Apx. "C") and sell to the Magnolia in 1919, and yet protect Price in his right to have sold under sale Statute and his preference right to buy, granted by the Enabling Act, and Sale Statute of 1909. From all of which it is clear that the right of purchase claimed by Price under the Enabling Act was denied existence, then and forever, before and after. Hence this case presents a question of the constitutionality of the "segregation Statute" (Apx. "B"), of 1908, and of authority claimed thereunder, and of a right claimed under the Act of Congress (Enabling Act), and is a proper one for this Court.

The opinion further descants on the "hundred fold more to the State from the oil than from sale", etc., (Rec. 184, last paragraph). This would "conclusively warrant" the state "duly segregating" all the Magnolia's properties, too, and many others. All would profit the State "an hundred fold"; and this, in itself, may "conclusively warrant" the action and the opinion; but we know the opinion was not warranted by such "dreams of avarice" realized. It sprang merely from mistaken view, we think, of the Law.

In the opinion it is further said (Rec. 185, second paragraph) "the Commissioners could not have acted in good faith to the trust imposed in them" if they had "advertised this land believing it contains oil and gas products which would pay a hundred fold more to the State than the sale of the land would pay", etc. This we believe "*non-sequitur*" also. They sold to the lessees the other three quarters of this section; all richer in oil than this quarter. They sold every quarter in the county but this and one other; they sold every quarter in the six counties but six or eight; they sold thousands of quarters all over the State, many of them, it is known, "swimming in rich pools of oil", to quote from the opinion, (Rec. 185, bottom). If they were recreant to their trust, should not such lands be recovered by a vigilant State? But if they knew and believed all this, they hazarded it all in the sale of the first "oil lease" on this land for the paltry sum of \$165.25 (Rec. 82) which lease was voluntarily surrendered. (Rec. 85, Exh. 6.) They have not been "criminally prosecuted for making such sale", as fearfully suggested in the opinion, (Rec. 186, top). The opinion further credits them with power of Divination, for it says "they were apprised of the oil values of the land". This we think the first instance in history, and we dislike to doubt it, but we

must. We think this must be credited to the enthusiasm of authorship, and can hardly be assigned as error of law, as no one is apprised of oil until he finds it with the bit.

But, if the Commissioners could so "duly segregate from sale" one tract of the granted lands on "supposition", they could duly segregate from sale two tracts, an hundred tracts,—all of it. In which case, what becomes of the provision of the Enabling Act granting lessees the right of purchase at the highest bid? What becomes of the provisions of the Constitution of Oklahoma, Art. XI, Sec. 4, that permits sale, but does not permit oil and gas lease? Authority to sell is not authority to lease, or traffic in lands,—

Thomason v. Upshaw Co. Tex., 211 S. W. 325 (Tex.);

Dallas v. Club, Co., 95 Tex. 200; 66 S. W. 294;

Pulliam v. Runnells Co., 79 Tex. 363, 15 S. W. 277,

particularly as in an oil and gas lease where a component part of the land is removed, or destroyed, and the surface rendered valueless. What becomes of the Legislative will expressed in Sales Statute (Apx. "C") and the right of purchase granted lessees therein? They simply do not exist, that's all.

So we think the opinion unfounded in the law, even though "conclusively warranted" in the oil; and we assign the decision following as erroneous, and ask its reversal, and an accounting as decreed by the Trial Court. We are not unimpressed by its "hundred fold" profit to the State so oft repeated and so strongly stressed in the opinion, and to those running along with it, in the enterprise; but the Magna Charta and its antecedents are before us; "those fundamental rights to life, liberty, property, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of Constitutional law * * * so that * * * a government of Law and not of men may exist", stares at us from the opinion of this Court in *Yick Wo v. Hopkins*, 118 U. S. 356, bidding us hope that Price's rights may be considered here, instead of the "hundred fold" benefit to the State, as recited below. The wealth of a State is in its probity, not its oil.

(Besides, the "hundred fold" was a figure of speech very largely. The oil value was not so extravagant as that. It was shown to be fairly valuable. We find no occasion for the exuberant language therefore, either in Law, or fact. The Record does not show it—until you reach the "opinion".)

This part of the opinion however is the highest evidence of the breach of the Trust created by the Enabling Act, instead of its observance.

It was when the State sought to effectually defeat the preference right of purchase in order that a promised speculative profit might be obtained that a breach of trust was committed. It seems very clear that the State could not defeat the lessee's preference right of purchase without violating the trust enjoined upon it, for if the lessee's preference right of purchase is a thing of value, it could not be defeated by state legislation or authority exercised under the State without impinging upon such right, and such trust. The promise of greater gain to the State would afford no legal or moral justification for the attempted nullification.

This, we think, is the principle affirmed in *Evriem v. United States*, 251 U. S. 41, 64 L. Ed. 128, where in defense of the state legislation, it was set up that it was the hope of the state to thereby increase the demand for the purchase and leasing of the granted lands, and in the enhancing of the prospective prices to be derived therefrom.

Answering this defense, the Court directed particular attention to the specific language of the dedication: "precluding any supplementary or aiding

sense, in prophetic realization. * * * That the State might be tempted to do that which it has done, lured from patient methods to speculative advertising in a hope of speedy prosperity.”

Referring further to the conditions presented, urging the wisdom of the act, it was said:

“It must be admitted there was enticement to it and a prospect of realization, and such was the view of the District Court. The court was of opinion that a private proprietor of the lands would, without hesitation, use their revenues to advertise their advantage, and that that which was a wise administration of the property in him could not reach the odious dereliction of a breach of trust in the state.”

The position of the State was held untenable, without extending “the argument, or multiplying considerations. The careful opinion of the Circuit Court of Appeals has made it unnecessary”.

This Court further said therein: “that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact performance of the conditions.” This is all we ask here.

In the Circuit Court of Appeals in the *Ervien* case, it was urged “that an advertisement of the entire State would benefit every portion of it, and

that the attraction of homeseekers and investors would make for a wider and better market for the trust lands". This contention was rejected, the Court saying: "But Congress made definite provisions specifying the character and extent of the notices of sale". In conclusion, it was held that the grant upon the "conditions and limitations prescribed" having been accepted by the Constitution of New Mexico, Art. 21, paragraphs 9 and 10, and some of the trusts being for such purposes as the establishment of insane asylums, etc., the Act of New Mexico of March 8, 1915 (Laws 1915, c. 60), authorizing the Commissioner of Public Lands to expend annually three cents on the dollar of the annual income from sales and leases of lands for making known the resources and advantages of the State, particularly to homeseekers and investors, was in its application to the proceeds of such trust funds, invalid, as in conflict with the "conditions and limitations" of the grant, and compliance therewith by the Commissioner of Public Lands was enjoined.

The question of the State's authority is not to be determined by the fact, or belief, that the State will profit as the result of the State legislation, but has it the power, constitutionally, to defeat or im-

pair rights attaching under the grant, or to do that which violates the trust, or contravenes the purpose of Congress in making the donation, and which the State irrevocably accepted "for the uses and purposes and upon the conditions and under the limitations for which the same are granted or donated"; and in its Constitution, Art. XI, Sec. 1, pledged the faith of the State to "preserve such lands * * * and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated."

On Injunction

Other points of law are raised by this suit that should defeat it:

(1) Price was in possession, as lessee, for a long period, 1908 to 1919. He peacefully resisted the invasion by the Magnolia until the Court tied his hands, and he yielded to constituted authority. The Magnolia sought to eject Price and secure possession by injunction. The plaintiff, Magnolia, in due process of law, must recover by the strength of its own title. It declared on a lease or grant that, as we have shown by *Guffey v. Smith*, 237 U. S. 101, and other cases herein, being "for five years and as

long thereafter, etc.,” was a lease or grant in place capable of indefinite duration. This violated the Enabling Act, Sec. 8 and Sec. 10, which permitted lease for “not more than five years” of Section 33. The lease was, therefore, void, and the suit should be denied and the costs and expenses put on plaintiff, and the Statute (Appendix “B”), having attempted such authority, should be declared void, as repugnant to the Act of Congress and the Constitution of the United States.

(2) Defendant being in peaceful possession under claim of right, the proceedings in injunction were not due process of law established in Oklahoma to eject him, and put another claimant in possession.

Sproat v. Durland, 2 Okla. 24; 35 Pac. 682, 886;

Black v. Jackson, 177 U. S. 349.

(3) This “injunction” in Oklahoma is a preventive remedy, not an assertive one.

(4) The Statute (Appendix “B”) forbade the lease of any public land to a “pipe line company” (Appendix “B”, Sec. 5). It was admitted that plaintiff is such. Its charter shows it. We do not ask that the case be dismissed on any one of these three preceding grounds, unless it is adjudged herein that defendant, Price, had, at the beginning of this

action, no interest, claim, or right or immunity as to said land which he could assert in law. If he had any right under the Enabling Act and Sales Statute (Appendix "C") that right is sufficient upon which to recover in this action. The Trial Court held that he had rights, but the Supreme Court denied him every vestige of claim. Thus is presented a clear cut issue of what the Enabling Act means; and, if it means not these things he has contended for, it means, at least, that he was entitled to protection of his possession and improvements until his right thereof and thereto was extinguished by due process of law, and paid for before the property was disturbed.

Constitution of Oklahoma, Art. 2, Sec. 24.

Denial of that right is a denial of due process of law and impairs defendant's contract of citizenship, as expressed in the Constitution, and is repugnant to the Constitution of the United States, Art. 1, Sec. 10.

Truax v. Carrigan, 257 U. S. 312; 66 L. Ed. 254.

And, if it means not even this, it must mean that the rule expressed in *Atherton v. Fowler*, 96 U. S. 513; 24 L. Ed. 732, applies that where one has peacefully initiated his claim on public lands, he is enti-

tled to be protected in his possession and enjoyment, and in the prosecution of his proceedings for title, or while awaiting a title in abeyance.

Haws v. Victoria Co., 160 U. S. 303; 40 L. Ed. 436;
Del Monte v. Last Chance, 171 U. S. 75; 43 L. Ed. 72;
Erhardt v. Boaro, 113 U. S. 527; 28 L. Ed. 1113;
New England Co. v. Congdon, 152 Cal. 211; 92 Pac. 180;
Miller v. Cressman, 140 Cal. 440; 73 Pac. 1083,

and also against legislation where he had accepted under former legislation.

Union Pac. v. Harriss, 215 U. S. 386; 54 L. Ed. 246;
Washington & I. Ry. Co. v. Osborn, 160 U. S. 103.

Possession by Price was, of course, notice to the Magnolia of all he claimed, as also was his existing lease; and the Law; and the number of the Section (33), notice of all he could claim thereunder.

Guffey v. Smith, 237 U. S. 101, at p. 118.

If in this we are mistaken, and if the preference right carried with it anything of value, then as we have already seen, the Commissioners could not lawfully, pending a sale, cause the land to be exploited for oil and gas by another, the result of which would be to destroy the value of the land to

him. In other words, he had a protectable interest, (*Schwab v. Wilson*, 72 Kan. 617, 84 Pac. 123), which would defeat plaintiff herein.

Conclusion.

Wherefore, Petitioners in Error pray this Court to vacate the judgment, decree and order of the Supreme Court of the State of Oklahoma, and re-instate and establish the judgment, decree and order of the District Court of Stephens County, Oklahoma, in this case entered (Record 152-159); or, if the judgment of this Court be different therefrom in any degree, then, the whole case being here, that this Court order a judgment decree proper under the law, in favor of said defendant, Price, and that the case be reversed and be remanded, with directed judgment.

J. F. SHARP,
C. B. STUART,
M. K. CRUCE,
W. C. STEVENS,
E. E. BLAKE.



APPENDIX "A"

An Act.

TO PROVIDE for the appraisement of the lands granted to the State for educational and other public building purposes; authorizing the commissioners of the Land Office to procure geographical and statistical information concerning the same: providing for the renewal of certain leases thereon pending such appraisement and authorizing the Commissioners of the Land Office to make leases thereafter and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. All leases expiring between December twenty-fifth, nineteen hundred seven, and April fifteenth, nineteen hundred eight, are extended without further act of the commissioners of the land office until January first, nineteen hundred nine, in all cases where lessee desires extension; and that such extension shall be made at such advance, if any, above the annual rental, as shown by the last lease contract, as the commissioners of the land office may deem fair and just; Provided, any lessee feeling himself aggrieved by the action of said commissioners of the land office may, by application to such commissioners, present his objections, and said commissioners are empowered to adjust the rental in such cases as they may deem fair and just.

Sec. 2. It shall be the duty of the commissioners of the land office to cause an appraisement to be made as soon as practicable of all lands granted to the State for educational and public building purposes. Said appraisement to contain a complete description of said land, showing the number of acres in cultivation on each quarter section, the

amount of cotton, corn and other farm products raised on said land for the year nineteen hundred seven and nineteen hundred eight, the actual cash value of said land with the improvements thereon, the value of the improvements, giving a description and kind of said improvements, the cash value of the same, the number of years said improvements have been on said land, the name of the lessee occupying same, and if the land leased is not occupied by the lessee, and the same has not been subleased by the lessee, give the price for which said sublessee pays per acre. Said appraisement to contain a list of all lands suitable for townsite purposes, and state whether or not any of said land is now being used for townsite purposes, and if so, the kind and character of buildings thereon, said appraisement to contain a complete geographical and statistical report by counties and such additional information as may be required by the commissioners of the land office; Provided, the appraisers shall not be appointed from the county in which the land to be appraised is located or from any county adjoining the county in which the land to be appraised is located; and Provided further, that no one who has any interest or claim in any of the school lands shall be appointed as such appraiser.

Sec. 3. It shall be the duty of the commissioners of the land office to make a detailed and summarized report of all the statistics obtained under the provisions of this Act, to the next Legislature, on or before the fifth legislative day thereof.

Sec. 4. All laws, rules and regulations in conflict herewith are hereby repealed.

Sec. 5. For the preservation of the public peace and safety, an emergency is hereby declared to exist, and this Act shall take effect from and after its approval.

Approved April 8, 1908.

APPENDIX "B"

An Act.

TO AUTHORIZE the Commissioners of the Land Office to Lease Public Lands for Oil and Gas purposes.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. When any tract of the school and other public lands, granted to the State of Oklahoma under the Act of Congress known as the "Enabling Act" is, by the commissioners of the land office of the State, known to contain oil or gas, or where such lands are, by said commissioners, deemed valuable for oil and gas purposes, such commissioners shall enter of record in their office, their finding, declaring that such oil or gas character exists, and further declaring that the oil and the gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act.

Sec. 2. Each agricultural, timber, grazing or other lease to any surface interest in the deposits segregated, as provided in section one hereof, and further reserve to the State and its lessees and grantees the right to drill and operate oil and gas wells on such premises, and the easement use and right of way to enter upon and fully enjoy the mining right reserved in this Act.

Sec. 3. The oil and gas interest described in this Act in such lands may be leased by the commissioners of the land office for oil and gas purposes to the same extent and in the same manner as a private owner of lands in fee could, in his own

right, execute a grant thereto, subject, however, to the following limitations:

First. For a period not exceeding five years, with suitable provisions for preference right to re-lease for a second term of five (5) years at its expiration, at the maximum rate of rents, royalties and bonuses that may be obtained therefor, at the time of such renewal.

Second. Upon due advertisement and public notice of not less than thirty days, in such manner as such commissioners may, by rule, prescribe.

Third. Such leasing shall be done under public bids and awarded to the highest responsible bidder; Provided, the commissioners of the land office shall have power to reject any and all bids.

Sec. 4. The lease contract of the State with any lessee for oil and gas purposes, shall stipulate, and the advertisement for bids for leasing such land shall specify a fixed royalty, to be determined by the commissioners of the land office, and in no event less than $12\frac{1}{2}$ per centum of the total output of such oil and gas, and in addition thereto any bonus offered for such lease, and shall also require a deposit of sufficient earnest money in the hands of such commission as such commission may require to accompany each bid, with appropriate conditions of forfeiture for failure to comply with the terms and conditions of bidding upon such lands. All leases for oil and gas provided in this Act shall contain a provision requiring the lessee to drill a sufficient number of wells upon the leased premises to offset the wells upon adjoining contiguous premises, and a further provision that a failure to faithfully operate the leased premises for oil and gas to as full an extent as individual and corporate premises are being operated within the general oil and gas field where such land is located, shall forfeit such lease to the State. No transfer

or assignment of any lease shall be valid or convey any right in the assignee without the consent in writing of the commissioners of the land office. The board of land office commissioners shall require a good and sufficient bond for the faithful performance of said lease and may make such additional rules and regulations covering same as are not specifically provided for in this Act.

Sec. 5. No lease shall be executed to, or in the interest of any pipe line or transportation company, or any company allied to, or confederated therewith or any subsidiary company thereof, nor any other company, corporation, person or association under the control of either or all of them, nor to any stockholder, officer, director, agent, representative or employee, acting singly or as firms or corporations of such company, or either of them. Leases executed under the terms of this Act shall stipulate that, for any refinery or crude oils and its products and by-products, owned, operated or controlled by the State, the State shall have the preference right to purchase and receive the output of such oil and gas lease at the market price thereof; Provided, nothing in this Act shall prevent the lessee from selling the output of said leases to any person, firm or corporation whatsoever until notice in writing from the commissioners of the land office shall be served on the lessee that the State is ready to take such oil and gas, or either of them, and all sales of oil and gas under this proviso shall be valid and binding.

Sec. 6. Any person, firm or corporation leasing under the provisions of this Act, and operating for oil and gas, shall be liable to the surface owner, the lessee or purchaser, for all damages or loss accruing to the surface interest in said land and to all crops and improvements thereupon and appurtenances and hereditaments thereunto belonging,

whether said land be agricultural, timber, grazing or otherwise.

Sec. 7. Should the lessee or owner of the surface interest and the lessee of the oil and gas interest specified in this Act be unable to agree upon the damage and loss sustained by such surface lessee or owner by such lessee of the oil and gas interests therein, may condemn the same for such purpose under the law of eminent domain to like extent and in the same manner and upon the same procedure and remedies as is provided for the assessment of damages and compensation to the owner of the fee in case of condemnation for railway purposes.

Sec. 8. The commissioners of the land office shall have plenary power and authority to enter their finding of record in their office, modifying, altering or vacating any order, finding, or entry, and when any tract or parcel of land shall be proven to be valueless for oil and gas purposes, or such tract of land or the oil and gas field in which the same is situated shall become impoverished and exhausted, then such commissioners shall enter of record of their finding of such non-oil and gas bearing character, or of such exhausted or valueless condition for such oil and gas purposes, and when so entered of record by such commissioners, the oil and gas character of such land shall conclusively terminate. Upon premises leased for oil and gas purposes, no finding or other entry of record shall be made, modifying, altering or vacating any order, finding or entry, previously made until notice of not less than ten days shall be given by registered mail to the last known address of such lessee, or by posting notice in writing in a conspicuous place upon the premises vacated by such new finding, order or entry.

Sec. 9. The proceeds derived in bonuses and royalties and from other inducements and considerations for the execution and operation of the oil and gas leases in this Act provided, shall be carried into the several funds, for the use and benefit of which such lands were granted to the United States to the State of Oklahoma, and to the territory now comprising the area embraced within the said State under the provisions of the Enabling Act, and any and all other Acts of Congress, for the uses and purposes, and upon the conditions and under the limitations for which the same were granted, and the money resulting from such lease and from the operation thereof shall be handled, disposed of and used in like manner as the other moneys belonging to said several funds under the laws of this State.

Sec. 10. All Acts and parts of Acts, rules and regulations, as well as the alterable provisions of the schedule of the Constitution of the State, in conflict herewith, are modified, amended and repealed to conform hereto.

Sec. 11. An emergency is hereby declared, by reason whereof it is necessary, for the immediate preservation of the public peace and safety, that this Act take effect from and after its passage and approval.

Approved May 26, 1908.

APPENDIX "C"**Sale of Certain Lands Provided For.**

Amended Senate Bill No. 1.

AN ACT providing for the sale of all the public lands owned by the State of Oklahoma Taken in Lieu of Lands Embraced in Sections Numbered 13, 16, 33 and 36, according to the United States Survey, known as "Indemnity Lands;" Providing also for the Sale of all the Lands Embraced in Sections Numbered 33, Reserved by the United States and Granted to the State; Providing also for the Sale of the Tracts of Land Now Platted and used for Townsite Purposes Embraced in Sections Numbered 13, 16, and 36; and Providing also for the Sale of all the Lands withdrawn from the Public Domain, Reserved from Homestead Entry and Granted to the State under and by virtue of Section Twelve of an Act of Congress, Approved June 16th, 1906, known as the Enabling Act of the State of Oklahoma; Subject to certain Exceptions, Conditions, Rules and Regulations as herein Provided for; And Providing Penalties for the Violations thereof.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. The Commissioners of the Land Office shall dispose of, sell and convey, subject to such limitations, exceptions, conditions, rules, regulations and instructions, as provided in the Enabling Act, in this act, or any act amendatory hereof, except where same is embraced in any reservation specifically reserved from sale in this act or in act of Congress or any act of the state specially reserving any part thereof, for any special purpose, all of

the following enumerated and described school and public lands of this state;

All lands owned by this state, reserved, granted and taken in lieu of sections numbered sixteen (16), thirty-six (36), thirteen (13) and thirty-three (33), and known as Indemnity Lands; Provided, that when such lands or any part thereof are sold and conveyed, the proceeds derived therefrom shall be prorated among the several funds as their interest may appear, and used as provided by law; also all lands embraced in sections numbered thirty-three (33) in that part of the state formerly known as Oklahoma Territory, and granted to the state for charitable and penal institutions and public buildings; Provided, that all the money derived from the sale of any or all of said lands, shall be apportioned and disposed of as may be provided by law; also all lands granted to this state by the United States under and by virtue of section 12 of the Enabling Act for the following purposes, namely: For the benefit of the Oklahoma University, two hundred and fifty thousand acres; for the benefit of the Agricultural and Mechanical College, two hundred and fifty thousand acres; for the benefit of the University Preparatory School, one hundred and fifty thousand acres; for the benefit of the Colored Agricultural and Normal University, one hundred thousand acres; and for the benefit of the normal schools now established or hereafter to be established, three hundred thousand acres; Provided, that all money derived from the sale of any of said lands shall be invested for said state in trust, and interest thereon shall be used exclusively and as above proportioned in the support and maintenance of said school; Provided, that if any tract, part, or parcel of any of the land enumerated and described in this section, was or shall be returned to the Commissioners of the Land Office by a board of appraisers thereof, including those tracts of land

embraced in sections numbered thirteen (13), sixteen (16), and thirty-six (36), and otherwise herein reserved from sale, that are now platted and occupied and leased directly from the State or Territory of Oklahoma for townsite purposes, as being more valuable for town site than for agricultural purposes, then such tract, part or parcel of such land shall be by said Commissioners of the Land Office, reserved from sale and disposed of under the terms of this bill; Provided, further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915.

Section 2. All proceeds of the sale of such lands described in section 1, of this act shall be sacredly preserved for the use and benefit of the several funds, institutions, and purposes for which said land was granted by the United States to the State of Oklahoma, under the provisions of the Enabling Act, and of any and all other acts of Congress, and by the Constitution, for the uses and purposes, and upon the conditions and under the limitations for which the same was granted and the money resulting from such sale shall be handled, disposed of, and used by the state in like manner as the other moneys belonging to said several funds under the laws of this state.

Section 3. (a) No person shall be permitted to purchase more than one quarter section of land under the provisions of this act, except as provided by the terms of the Enabling Act; Provided, however, that the land granted to the state under and by virtue of section 12 of an act of Congress, approved June 16, 1906, commonly known as the Enabling Act, commonly called "New College Lands", shall be classified by the Commissioners of the Land Office from the appraisement heretofore made as

agricultural and grazing lands. All of said lands which has of its surface twelve and one-half per cent or more and less than thirty-seven and one-half that is tillable, productive and suitable for farming purposes, shall be classified as Class A, and said class of grazing land shall be sold in tracts not to exceed one section; and all lands having less than twelve and one-half per cent of its surface that is tillable, productive suitable for farming purposes; that is rough, mountainous or barren, shall be classified as Class B, and sold in tracts not to exceed two sections if in the opinion of the Commissioners of the Land Office it is deemed best and proper.

(b) Any lessee holding a lease on any of the lands described in section 1, of this act, except New College Lands, shall have the preference right to purchase one hundred and sixty (160) acres so leased at the highest bid at the time of the sale of the same as hereinafter provided in this bill; Provided, further, that none of the lands enumerated in section 1, of this act, except the lands that bear no preference right which were secured under and by virtue of section 12, of the Enabling Act, which is under lease to any person or persons holding a lease on more than one hundred and sixty acres, on which he may claim a preference right of purchase, shall be sold until such lessee shall file a written waiver of his preference right to purchase any of such land so leased, except one hundred and sixty acres, with the Commissioners of the Land Office, and the said Commissioners shall reserve the same from sale until such waiver is so filed, and the purchaser shall accept said land with condition of such waiver; Provided, further, until the lessee of any land so leased on which he may claim a preference right of purchase does waive his preference right on all lands in excess of one hundred and sixty acres, he shall pay to the state as rental or lease not less than six

per centum of the value as fixed from time to time by the appraisers appointed by the Commissioners of the Land Office.

(c) The Commissioners of the Land Office shall, as soon as possible, after the sale of lands, transmit to the clerk of each county in which any lands mentioned in this article have been sold, a detailed description of each parcel of the land so sold and the names of the purchaser, and the clerk shall extend the same upon the tax rolls for the purpose of taxation, and the same shall, thereupon, become subject to taxation the same as other lands and the taxes assessed thereon collected and enforced in like manner as against other lands; Provided, however, that the purchaser, at a tax sale of any such lands sold for delinquent taxes shall only acquire, by virtue of such purchase, such rights and interest as belong to the holder and owner of the certificate of sale issued by the Commissioners of the Land Office under the provisions of this act and the right to be substituted in the place of such holder and owner of such certificate of sale as the assignee thereof; and upon a production to the proper officer of a tax certificate given upon such tax sale, in case such lands have been redeemed, such tax purchaser shall have the right to make any payment of principal or interest then in default upon such certificate of sale as the assignee thereof. But no tax deed shall be issued upon any tax certificate procured under the provisions of this act while legal title of said lands remains in the State of Oklahoma. Whenever a certificate for the sale of any of said lands has been cancelled, it shall be the duty of the Commissioners of the Land Office to notify the clerk of the county in which such lands are located of said cancellation and thereafter such lands shall not be listed for taxation but in the event of redemption of any such lands the party making such redemption shall pay as taxes and in addition to all other charges an

amount equal to the taxes last levied thereon for each year such land was not listed for taxation together with such interest and penalty as would have been charged if the same had been regularly listed and taxed.

Section 4. Said lands and improvements thereon shall be sold under the appraisement of the year 1908, made and returned to the Commissioners of the Land Office; Provided, that in the event it shall appear the said land or improvements have not been properly appraised, the Commissioners of the Land Office shall have the power to order and provide for a new appraisement; Provided, further, the Commissioners of the Land Office shall notify the lessee before such land is offered for sale of the appraised value of his improvements and should any such lessee be dissatisfied with the appraised value of his improvements, said lessee shall within thirty days from notice thereof, notify the Commissioners of the Land Office in writing; whereupon the land covered by said lessee's contract shall be reserved from sale, pending a review of the appraisement made by the said Commissioners of the Land Office in the district court of the county in which said land is located. An appeal from the Board of Appraisers may be taken as provided in "An Act amending section 28 of article 9, chapter 17, of the Statutes of Oklahoma, 1893, and regulating the method of procedure in the condemnation of private property for both public and private uses," approved May 20, 1908; and the procedure of such appeal and the review and demand for jury trial in said court shall conform to the procedure therein set forth; and pending the termination of said appeal the lessee shall be entitled to remain in possession of said property, paying therefor as rental five per centum of the appraised value of said land upon which said improvements are located; Provided, however, in addition to that which is herein stipu-

lated, there shall nowhere be a meaning of any or all of the provisions or of the sections of this act, collectively or several(ly), so construed as to extend to any lessee the preference right of purchase to any of the lands withdrawn from homestead entry and granted to the state under and by virtue of section 12 of the Enabling Act.

Section 5. The state shall have first lien upon all lands sold under this act, together with all improvements and appurtenances thereunto belonging until all payments, both principal and interest, are made thereon, and upon such payments being made, the Commissioners of the Land Office in forms of law shall execute to each purchaser as in this act provided, a patent in fee simple; Provided, a certificate of purchase reciting the conditions of such purchase shall be issued to every purchaser under this act immediately upon execution of the contract of purchase and such certificate of purchase shall be entitled to record, as evidence of the same, under the provisions of the law of conveyance.

Section 6. If the lessee of any tract of land sold by the state shall not become the purchaser of the lands leased by him, he shall retain possession of any portion of said land upon which he shall then have growing crops until he shall have sufficient time to mature, harvest and remove same from such land; Provided, no extension of such time of possession shall extend longer than the thirty-first day of December, after the sale thereof.

Section 7. Upon the sale of such lands as provided herein, if any lessee having "preference right" to purchase as provided herein, fails or refuses to pay the highest *bona fide* bid thereon, then upon said lessee's fixing a date at which time he will surrender possession of said property the purchaser will pay to the Commissioners of the Land Office, or their authorized agent, to reimburse the lessee

having such preference right, the appraised value of all such improvements (as defined in section 4) and all purchasers of land sold under this act shall pay to said Commissioners or their authorized agent the appraised value of all the improvements upon said land to reimburse the lessee having such preference right to said value; and upon possession being given by the lessee, the Commissioners of the Land Office shall immediately pay to him the value of all such improvements paid to them by such purchaser.

Section 8. In addition to the value of the improvements, five per cent of the purchase price of the land shall be paid at the time of the sale, except where the land sells for less than one thousand dollars, in which case the initial payments shall be fifty dollars on any quarter section. The remainder of the purchase price may be paid in forty equal annual payments with the interest at the rate of five per cent per annum; Provided, that after the expiration of five years, the purchaser may, at the time of any interest payment, pay any or all deferred payments, both principal and accrued interest; Provided, the purchaser shall not be permitted to sell the land so purchased until the end of five years from the date of purchase to any person or persons owning more than one section according to the United States survey; Provided, as a further condition herein required of purchasers under the provisions of this act, the purchaser of any land, sold under the provisions of this act, shall be required to establish and maintain valuable, lasting, permanent improvements other than fencing, together with tillage of same upon lands so purchased, and if the land purchased is grazing land he shall be required to establish and maintain valuable, lasting, permanent improvements, other than fencing only, thereon, before he shall acquire title from the state to any of the land so purchased; and purchas-

ers of said land shall be limited in purchase of said lands to said lands, and shall not exceed the above mentioned maximum amounts, respectively, of either agricultural or grazing lands; and such purchaser shall take such land, subject to such restrictions and conditions. Violations of this provision shall work a forfeiture of said lands, together with all appurtenances thereunto belonging, and the same shall then escheat to the state upon proof of a violation of the conditions herein provided; Provided, whenever the holder of any certificate of purchase of any state or school lands shall surrender the same to the Commissioners of the Land Office with the request to have the same divided into two or more certificates, it shall be lawful for the commissioners to issue the same; Provided, further, that no new certificate shall issue while there is due and unpaid any interest, principal or taxes on the principal certificate of same when in any case where the Commissioners of the Land Office shall be of the opinion, after an examination of the land if necessary, that the security would be impaired and endangered by the proposed division, and for all new certificates a fee of one dollar for each certificate so issued shall be paid by the applicant; each fee shall be a part of the expense fund of the Commissioners of the Land Office.

Section 9. Any purchaser of lands under the provisions of this act shall have the right to transfer or assign all his right, title and interest in and to such lands, and such assignment shall be in form and executed and acknowledged as required under the laws governing conveyances; Provided, before delivery of patent, such assignment, to be valid, shall be duly recorded in a proper book kept for that purpose by the commissioners of the Land Office; Provided, further, that where the purchaser

of such lands has a husband or wife such husband or wife shall join in the assignment of any such contract.

Section 10. All purchasers, lessees, or holders of any of the public lands of this state, shall take the same, subject to the conditions of this act; and all certificates, contracts or written evidence issued to any purchaser shall recite that the same is taken and accepted subject to all the conditions of this act or any act amendatory hereof.

Section 11. All lands shall be sold at public auction at the door of the county court house, wherein county court is held of the county wherein such land is situated, and shall be sold under such rules and regulations as the Commissioners of the Land Office may prescribe, not inconsistent with the provisions of this act; Provided, that none of the said lands shall be sold for less than its appraised value. Each bidder shall deposit with the Commissioners of the Land Office, or its authorized agent, cash or its equivalent, before making his bid, to the value of ten per centum of the lessee's improvements, and no additional deposit shall be required until the applicant shall obtain same tract of land applied for, and the lessee shall then and there, either in person or agent, and before the next tract is offered for sale, exercise his election of taking such land at the highest bid and complying with the requirements of the purchase thereof or receive the appraised value of his improvements as provided herein; Provided, that if no bid shall be made, the lessee may take said land at the appraised value. Such sale shall not be made in more than one county in the same week.

Section 12. Before selling the lands herein authorizes to be sold the Commissioners of the Land Office shall advertise the fact that such sale will be had, by the publication in three issues in at least

three agricultural journals of national circulation, also in one newspaper of a general state circulation, within the State of Oklahoma, and also in one county paper of general circulation within the county in which any of such lands are located. Such notice shall state the terms and conditions of such sale, and the amount of lands to be sold, and shall also state that full and complete description of each tract can be had by application to the Commissioners of the Land Office of Oklahoma; Provided, also, that the said Commissioners shall, in addition to such advertising, have printed in pamphlet form for free distribution, a complete list of the said lands by counties and townships, giving a description in brief of each tract with the improvements thereon, setting out the separate appraisements of the same.

Section 13. Before any certificate of purchase is issued for any part or parcel of the public lands of this state, the purchaser thereof shall make an affidavit that the land purchased is for his own use and benefit and not either directly or indirectly for the use and benefit of any other person or persons, firm, association, or corporation. In the event that such purchaser fails or refuses to fully comply with all the requirements of the law and the rules and regulations of the Commissioners of the Land Office, authorized by law, governing sales of the land sold under the provisions of this act and make such affidavit, the deposit required in section 11 hereof, shall be forfeited to the state for the benefit of the fund for which the land is sold.

Section 14. The Commissioners of the Land Office shall reserve from sale, as in the foregoing section provided, any lands lying near or within the limits of any city, town or place, which may have a greater value than for farming purposes, by being platted and sold as town lots, acreage tracts, or

public parks; and said commissioners shall cause said lands to be surveyed, platted, appraised and sold at public auction for such purposes, and the lessee shall have the preference right to buy at the highest and best bid. All purchasers shall immediately pay to the Commissioners of the Land Office ten per cent of the amount of the purchase price; The balance shall be paid in ten equal annual payments, same to bear interest at five per cent per annum, payable annually; Provided, the purchaser shall have the privilege of paying any or all deferred payments, with all accrued interest thereon any date after two years from date of purchase. Failure to make payment for six months after any payment and interest accrued thereon shall have become due and payable, as provided in this section, shall forfeit to the common school fund of the state or the institution or the fund to which such land may belong, any such lot, together with all appurtenances thereunto belonging and all payments made thereon, and said lot so forfeited shall be resold, together with the improvements thereon at public action on such terms as hereinbefore provided; Provided, further, all tracts of lands embraced in sections numbered thirteen (13), sixteen (16), and thirty-six (36), and otherwise herein reserved from sale under the provisions of this act, that are platted or laid out for townsite purposes, that are occupied, and that are under lease directly from the Territory or State of Oklahoma, shall also be sold as provided for tracts aforementioned in this section, so reserved and sold under the provisions of this act.

Section 15. All the lands not leased, described and enumerated in section 1 of this act, shall be opened for sale immediately upon the appraisalment of the same as provided in this act and by law, and all of said lands offered for sale under the provisions of this act that are leased shall be sold upon

the expiration of each lease contract, or sooner upon petition of lessee to the Commissioners of the Land Office, asking for sale of any of said lands so leased.

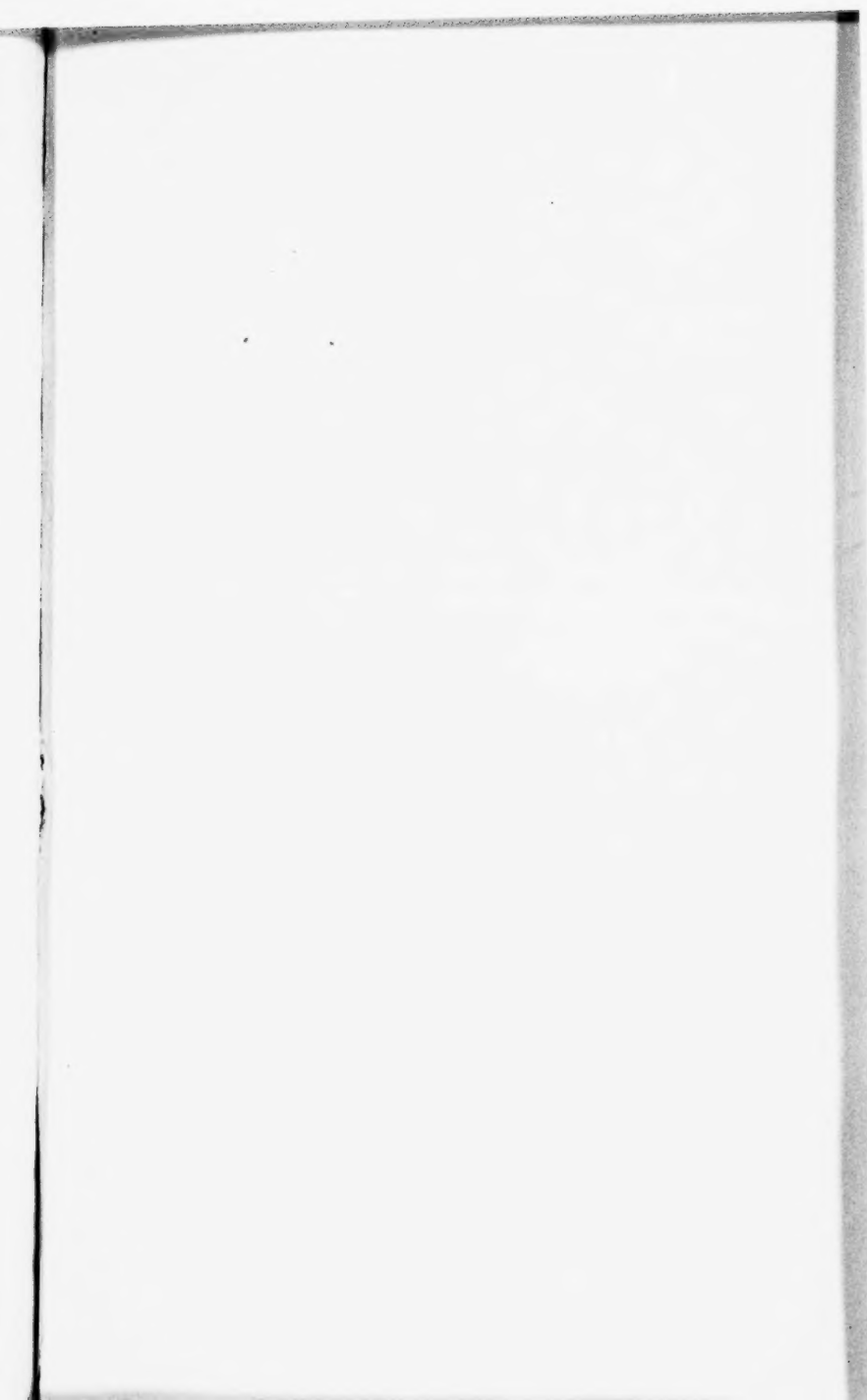
Section 16. The Commissioners of the Land Office shall prescribe forms of oaths and rules to govern applications to buy such lands, and any other rules not inconsistent herewith, to carry out the provisions of this act. Any applicant to purchase land, or any other person who shall knowingly make any false affidavit touching the sale of said lands or knowingly swear falsely in relation thereto, shall be guilty of false swearing and upon conviction be punished by confinement in the penitentiary for not more than three years.

Section 17. Any willful violation of this act by any member of the Commissioners of the Land Office or by any member of any board of appraisers or by any other officer or agent selected to perform any of the duties required under this act shall constitute a felony, and upon conviction, he shall be punished by imprisonment in the penitentiary for not less than three years, nor more than ten years, and shall be summarily removed from office and forever disqualified from holding any office of honor, trust, or profit under the Constitution or laws of this state.

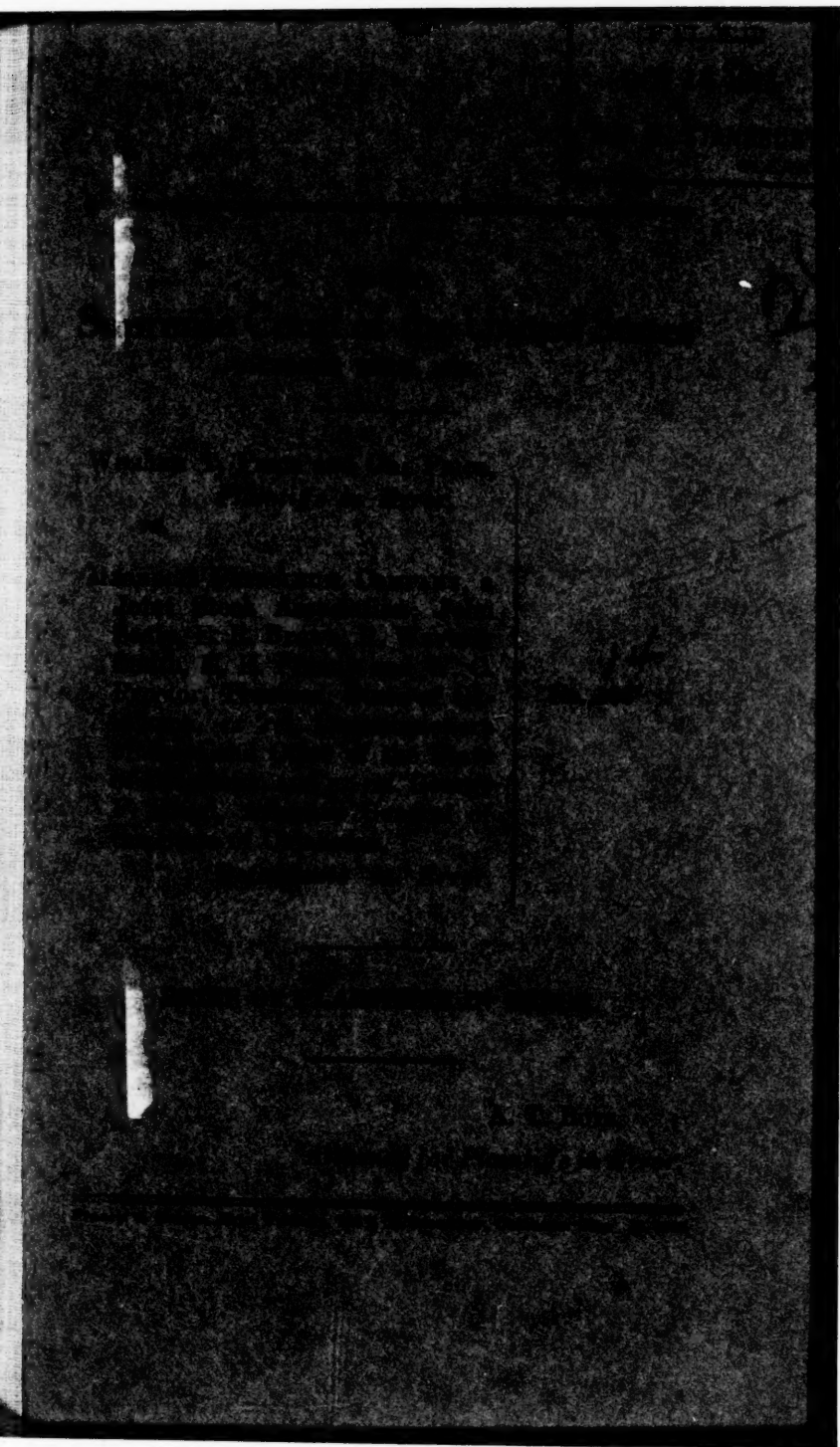
Section 18. All acts and parts of acts in conflict herewith are hereby repealed.

Approved March 2, 1909.









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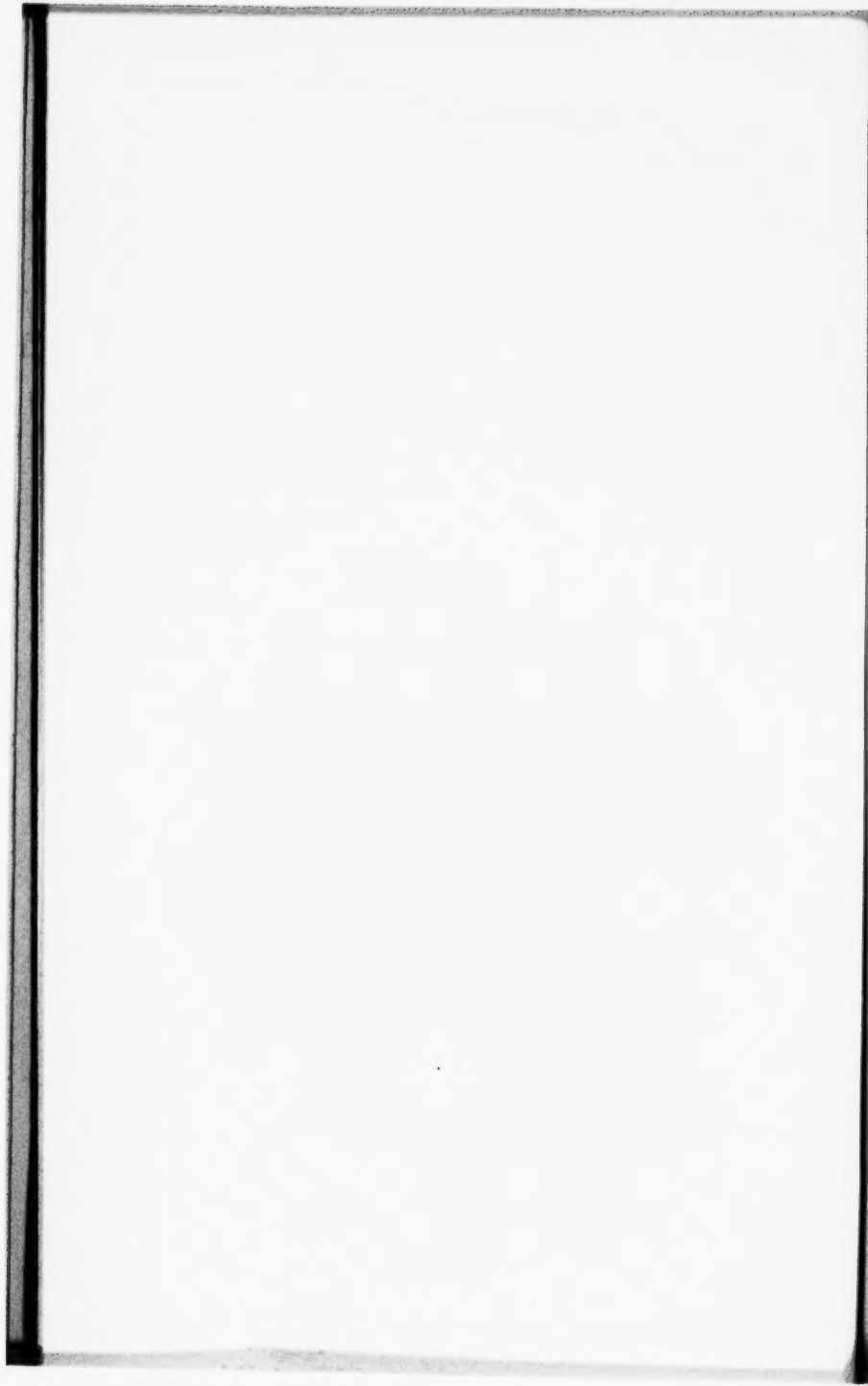
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Supreme Court of the United States

OCTOBER TERM, 1923.

WILLIAM T. PRICE and ORA PRICE,
Plaintiffs in Error,
vs.

MAGNOLIA PETROLEUM COMPANY, a
Joint Stock Association; John
Sealy, E. R. Brown, R. Waverly
Smith, E. E. Plumly and W. C.
Proctor, Trustees; State of Ok-
lahoma, *ex rel.* Commissioners
of the Land Office of the State
of Oklahoma, and *ex rel.* George
F. Short, Attorney General of
the State of Oklahoma,
Defendants in Error.

No. 106

BRIEF OF PLAINTIFFS IN ERROR.

ABSTRACT OF THE RECORD.

This action is brought in this Court upon a writ of error to the Supreme Court of the State of Oklahoma, by the plaintiffs in error, William T. Price and Ora Price vs. Magnolia Petroleum Company, a joint stock association; John Sealy et al., as its Trustees, and the State of Oklahoma, *ex rel.* Commissioners of

the Land Office, and *ex rel.* S. P. Freeling, attorney general of the State of Oklahoma.

The petition for writ of error appearing, Record, pages IV. to VII.

Order allowing writ of error, appearing page VII.

Writ of error appearing pages IX.-X.

Citation to defendant and service thereof, appearing Record pages 1-11.

Return of writ, appearing Record page 1.

Assignment of error, appearing Record pages 203-213.

The defendant in error, the Magnolia Petroleum Company, filed its petition for injunction in the District Court of Stephens County, Oklahoma, on the 25th day of May, 1920 (Record, pages 4-7), and thereafter filed their amended petition, appearing Record, pages 8 to 26. On the ---- day of November, 1920. On this amended petition the case was tried. The material parts of the petition are as follows:

“AMENDED PETITION.

“First. That the State of Oklahoma is the

owner of the following described real estate situated in Stephens County, Oklahoma, to wit:

“The Northeast Quarter of Section 33, Township 1 South, Range 8 West,

and that on the 4th day of January, 1919, said State of Oklahoma, acting by and through the Commissioners of the Land Office of the State of Oklahoma, made, executed and delivered to the plaintiff an oil and gas mining lease on the above described land. A copy of said oil and gas mining lease is attached to this petition and made a part of the same and marked plaintiff's ‘Exhibit A.’

“Second. Plaintiff alleges that said defendants, William T. Price and Ora Price, are in possession of said premises, using the same for agricultural purposes; that on the 22nd day of March, 1916, the State of Oklahoma, acting by the Commissioners of the Land Office of the State of Oklahoma, made, executed and delivered to said defendants an agricultural lease on the above described premises for a term of five years. A copy of said agricultural lease in blank is attached to this petition and made a part of same and marked plaintiff's ‘Exhibit B.’

“Third. Plaintiff alleges that heretofore, to wit, on the 26th day of August, 1915, the Commissioners of the Land Office of the State of Oklahoma, in a regular duly held session in the office of the Secretary of State, at Oklahoma City, made and had the following proceedings in *re.* segregation of land for oil and gas purposes:

“The Secretary presented the following recommendation to the board for approval:

“ ‘Whereas, we have had offers from reputable parties to place oil and gas bids on the following

unsegregated school lands, I hereby recommend that the following described lands be segregated for oil and gas purposes, and that they be advertised for bids for leasing * * * the Northwest Quarter of Section 33, Township 1 South, Range 8 West, Stephens County, * * *. After discussion by the Board, it was thereupon moved by Mr. Lyon and seconded by Mr. Howard that the above sections and quarter sections be declared valuable for mineral purposes, and that the same be segregated and withheld from sale.'

"All voted aye and the motion prevailed, and there was duly entered of record in said office their said finding, declaring that such oil and gas character exists, and further declaring that the oil and gas deposits are segregated from the surface use and interest there, and such segregation of such deposits thereby conclusively withhold the same from sale, lease or other alienation, except as provided by the laws of Oklahoma. And thereafter, the said Commissioners, desiring to lease said land for oil and gas purposes to the same extent and in the same manner as a private owner of land in fee could in his own right execute a grant thereto, did duly authorize the advertisement of the said tract for leasing for oil and gas purposes and for bids to be made thereon, and after due advertisement an oil and gas lease thereon was duly sold to the plaintiff herein and a lease duly executed as shown by Exhibit 'B.'

"Fourth. The plaintiff further alleges that under and by the terms of said oil and gas mining lease it has the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas from said above described premises and to occupy and use the same and so much of the surface thereof as may be reasonably necessary to carry on the work

of prospecting for, extracting, piping, storing and removing such oil and natural gas. Also the right to obtain from wells or other sources on said operations (land), except the private wells or ponds of the surface owner or lessee and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

“The plaintiff further alleges that said premises are in the same section of land as what is known as Empire Well No. 1, which has been recently drilled in that section and which is producing approximately 800 barrels of oil per day and that drilling for oil and gas is being done in all directions from said quarter section of land; that it is necessary, in order to protect the interest of the State of Oklahoma and the rights of the plaintiff under said oil and gas lease, that said above described premises should be developed for oil and gas. That there is a number of wells being drilled for oil and gas in the Southwest Quarter of said section of land, which are down about to the sand expected to be found in that vicinity, and there is also a well being drilled just northwest of said above described premises in which the casing has been set and is expected to be drilled into the sand within a few days. If oil or gas should be found in paying quantities in any of the surrounding wells being drilled, it will be necessary for the plaintiff, under said oil and gas mining lease, to immediately explore and develop said above described premises for oil and gas in order to hold its contract with the State of Oklahoma, and it is, therefore, necessary for the plaintiff to begin operations for the development of said premises at this time and immediately. The plaintiff further alleges that on the 24th day of May, 1920, acting by and through its

duly authorized representatives, it went upon said above described premises for the purpose of making a location for the drilling of a well; that the place it decided to make the location is in the Southwest Quarter of the Northeast Quarter of said Section 33, Township 1 South, Range 8 West, and that the said defendant, William T. Price, objected to the plaintiff going on said premises and making said location, or on any part of said premises and absolutely refused to permit the plaintiff to go on said location or any part of said premises for the purpose of drilling thereon for oil and gas and forbade plaintiff from going on said premises for said purposes and ordered its representatives to keep off the same, and threatened plaintiff and its agent with bodily injury, and by force and violence refused to allow the plaintiff, its agents or employees, to go upon said premises for the purpose of drilling for oil and gas or making any development thereon, or any part of the same. The plaintiff is now ready and desires to immediately begin erecting a derrick on said location above described, and to begin preparation to drill a well thereon and to explore and develop all of said premises for oil and gas. And the plaintiff is being deterred from said action by the acts and conduct of the defendants aforesaid.

The plaintiff further alleges and states that it offered to pay the defendants for any loss or damage that they might sustain by reason of the plaintiff moving on said premises and on said location, to their crops, and to pay them for any labor that they might lose by reason of the plaintiff moving on said location or on said premises, but that the defendants still refused to allow the plaintiff to go upon said premises for the purposes aforesaid.

“Fifth. That after the filing of the original

petition, plaintiff drilled two wells to a depth of about 1700 feet to the oil and gas bearing sand, and discovered oil and gas in paying quantities, and is now producing 120 barrels of oil per day from the said premises and marketing the same, and two other wells are in the course of drilling, one of which has reached the sand, but is not drilled in. That the amount and value of said oil cannot be stated or determined, and that unless plaintiff is permitted to continue the development and production of such oil, it will be subjected to irreparable injury, which cannot be estimated or determined with any accuracy in a proceeding at law, and the defendants would be wholly unable to respond in damages for such damages as would be sustained.

"Sixth. That under and by virtue of the terms of the lease attached to the said petition and marked Exhibit 'A,' the defendants' right terminated and expired on the 31st day of December, 1914, and the defendant, desiring to renew said lease, under and by virtue of said rules adopted by the Commissioners of the Land Office of the State of Oklahoma, by G. A. Smith, Secretary of the Commissioners of the Land Office of the State of Oklahoma, entered into an extension agreement with the said W. T. Price, the defendant herein, by the terms of which the said W. T. Price agreed, among other things, that his lease and right to possession of said land, and interest therein, should be subject to all the laws of the State of Oklahoma which are now or may hereafter be in force and effect, and which may hereafter be passed. A copy of the said extension agreement, duly executed by said defendant, is hereto attached and marked Exhibit 'C' and made a part hereof; that thereafter, under the laws of said State as hereinbefore stated, the said Northeast Quarter of Sec-

tion 33, Township 1 South, Range 8 West, was by the Commissioners of the Land Office, designated, set apart, segregated and reserved as mineral, oil and gas lands, as provided by the laws of the State of Oklahoma, and the said W. T. Price was in the possession of said land without any renewal of his former lease, but under the terms and conditions of the said laws and the said extension agreement, and thereby agreed to and consented to such segregation and the action of the said Commissioners of the Land Office in selling the oil and gas rights and in executing the lease to the plaintiff passed all the oil and gas rights to this plaintiff.

“That subsequent to the expiration of said lease and its extension, the defendant continued to occupy said premises, holding over from year to year under the rules and regulations of the said Commissioners and the laws of said State, and the Commissioners accepted from time to time the annual rentals and adopted a rule providing that any person who did not execute a new lease, but held over, should be presumed to hold over under the terms and conditions of the old lease and the extension thereof and the rules and regulations of the Commissioners and the laws of the said State, and such rules and regulations were known to the defendant and he held over subject to their terms and conditions.

“That in 1916, as required by law, the Commissioners were required to appraise said land, and appraised the same and fixed the rentals at \$95.00 a year and the said defendant recognizing the rules and regulations and law authorizing such appraisal and increase of rentals, paid since 1916, \$95.00 a year, each year, rental for said land.

"Seventh. The plaintiff further alleges that it has no adequate, speedy or sufficient remedy at law, and that the defendants are not able to respond in damages to the plaintiff for their acts and conduct as aforesaid.

"Wherefore, the plaintiff prays the Court for a permanent order, enjoining the defendants, and each of them, from in any manner interfering with the plaintiff in its drilling operations or other operations or explorations on said premises for oil and gas, and that a day be set for this Court for a hearing on this petition and that, pending a hearing of this petition for said permanent injunction, the plaintiff prays for a temporary injunction order restraining the defendants from interfering with the plaintiff in going upon said premises and making preparation to drill wells for oil and gas or in drilling wells thereon for oil and gas or in any manner interfering with the plaintiff in operating for oil and gas and developing the same as aforesaid under said oil and gas mining lease.

"That said restraining order be immediately issued by this court and that the costs of this proceeding be taxed against the defendants.

"WOMACK & BROWN,

"BLAKNEY & MAXEY,

"Attorneys for Plaintiff."

"EXHIBIT 'A.'

"THE STATE OF OKLAHOMA.

"Oil and Gas Mining Lease.

"T-162.

"This indenture of lease, made and entered into in duplicate on this the 4th day of January, A. D.

1919, by and between the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Magnolia Petroleum Company, John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumly and Geo. C. Greer, as Trustee, Box 1667, of Dallas, Texas, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Constitution and laws of the State of Oklahoma relating to the segregation of the oil and gas deposits and the leasing thereof on school and other public lands belonging to the State of Oklahoma, witnesseth:

“1. The lessor, for and in consideration of eight thousand (\$8,000.00) dollars, the receipt whereof is hereby acknowledged, and the royalties, covenants, stipulations and conditions hereinafter contained and hereby agreed to be paid, observed and performed by the lessee, and his lawful assigns, *does hereby demise, grant, lease and let unto the lessee for the term of five years from the date hereof, and as long thereafter as oil or gas or either of them is produced in paying quantities, all the oil deposits and natural gas in or under the following described tract of land lying and being within the County of Stephens, in the State of Oklahoma, to wit:*

“*The Northeast Quarter of Section Thirty-three (33), Township One (1) South, Range Eight (8) West of the Indian Meridian,*

and containing 160 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing

such oil and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil and natural gas as fuel as far as necessary to the development and operation of said property.

"2. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office of the State of Oklahoma, or their successors, a royalty of one-eighth part of the oil or gas produced from the leased premises or in lieu thereof pay to the State the market value of said royalty interest, as the Commissioners may elect. All oil and gas due to the State under this contract, shall be delivered by the lessee herein, free of cost, into pipe lines, tanks or cars, or settled or paid for before removing the same from the premises if handled in any other way. The lessee shall furnish to the lessor certified copies of gauge tickets, sales shipments and amount of gross production, at their offices in Oklahoma City. Gas to be metered on the premises under high pressure unless some other method of gauging and metering same shall be hereafter agreed upon by the parties hereto in writing."

Sections 3, 4, 5 pertain to the diligence in the operation of the oil and gas lease and the payment of the rentals in case of no drilling and the forfeiture of the lease in case no drilling or rental is paid and prohibiting the allowance of waste and reserving to the lessee the property placed on the lands

and for the method of accounting for the gas and oil produced.

Section 6 provides for the oil and gas lessee to pay to the *surface owner* or *surface lessee* for all damages or loss accruing to the surface interests in said lands and to all crops and improvements thereon.

Sections 7, 8, 9, 10, 11, 12 and 13 are not material to the issues in this case.

Said oil and gas lease to the defendants in error appears as Exhibit A to plaintiff's amended petition (Record, pages 14 to 19), and is the same exhibit as offered in evidence at the trial of the cause.

Exhibit B attached to defendants in error's amended petition in the trial below, appears of record, pages 20 to 24, inclusive, and omitting the certification, is as follows:

“EXHIBIT B.

“Received Jan. 14, 1913.

“Secretary.

“*Lease for Public Lands of the State of Oklahoma.*

“This lease made by and between the Commissioners of the Land Office of the State of Oklahoma, a Commission having charge of the sale, rental, disposal and management of the school and other public lands of the State of Oklahoma, and acting on behalf

of said State, and hereinafter designated as parties of the first part, and William T. Price of Comanche and hereinafter designated as party of the second part, witnesseth:

“That the said parties of the first part by virtue of the authority vested in them by the Constitution and Laws of the State of Oklahoma and in consideration of the covenants of the said party of the second part hereinafter set forth, hereby *lease and let* unto the said party of the second part the following described public land granted to said State by the Congress of the United States, to wit: The northeast quarter of section 33, township 1 south, range 8 west, of the Indian Meridian in Stephens County, State of Oklahoma, to have and to hold the same for a period of two years from the first day of January, 1913, to and including the 31st day of December, 1914; provided, however:

“This lease is made subject to the rights of the State of Oklahoma to sell and convey the land herein described at any time and that upon such sale, if any be provided by law prior to the expiration of this lease, the same shall thereupon expire, subject to such conditions, limitations, restrictions and exceptions as may be provided by law.

“And as a consideration for the leasing of said land, the said party of the second part hereby agrees to pay to the said party of the first part, as rent therefor, the total sum of one hundred thirty-one and no/100 dollars in installments as follows:

“Sixty-five and 50/100 dollars for the first day of October, 1913; sixty-five and 50/100 dollars for the first day of October, 1914.

“The said deferred payments are evidenced by two certain promissory notes of even date herewith and payable as above specified and signed by said

party of the second part as principal and one qualified person, a resident of said state, as surety.

“And as a security for the payment of the above described notes at the time the same are due and payable, the said party of the second part hereby expressly grants and gives unto the State of Oklahoma a first lien upon all crops and improvements now located, or which may be placed or made upon said land during the term of this lease.

“Said party of the second part may, at the termination of this lease, remove any or all of his improvements, and he shall have the right to harvest or remove any growing crop on said land, provided however, that in case said party of the second part is in default for non-payment of any rental or assessment of any nature, he shall not be allowed to remove such improvements or make such entry to secure crops until all arrearage is fully satisfied, said improvements that are movable shall then be moved immediately within sixty days from termination of this lease.

“If the said party of the second part shall be in default of the annual rental due the state for a period of three months and such delinquency is not paid within thirty days from the time of service of notice of delinquency, the parties of the first part shall declare this lease forfeited as by law provided and the land herein described shall revert to the State of Oklahoma the same as though this lease had never been made; provided, however, in case of forfeiture as provided by Section 6 of Chapter 118, Session Laws of the State of Oklahoma of the year 1910, the party of the second part has the right of redemption by paying all delinquencies, fees and costs of forfeiture at any time before such land is advertised to be leased. The improvements now located or which may hereafter be placed on said

described land in case of forfeiture and reverting of said land to the state as by law provided shall be sold under the direction of the Commissioners of the Land Office at public or private sale, upon due notice to the party of the second part, and the proceeds received therefrom shall inure to the said party of the second party after payment shall have been made to the state for all delinquencies and rents and expenses incurred in making such sale.

“The said party of the second part hereby agrees, binds and obligates himself that he will not cut or remove, or permit to be cut or removed, any timber from said land, that he will not quarry or remove, or permit to be quarried or removed, any building or valuable stone, from said land, that he will not mine or move, or permit to be mined or moved, any minerals therefrom, and that he will not remove or take from said land any sand or gravel or other deposits of like character without first obtaining written authority so to do as by the laws of said state provided. The said party of the second part hereby agrees, binds and obligates, that he is leasing said land for agricultural and grazing purposes and that he will use and occupy the same for no other purposes and that he will care for and cultivate the same in a husbandlike manner and that he will protect said land from waste and that he will not permit or suffer any waste or trespass to be committed on or against said land. The said party of the second part hereby agrees, binds and obligates himself that he will not assign, transfer, or relinquish this lease and his interest therein and his interest in the improvements without the consent and approval of the said parties of the first part, and that he will not sublease or underlet the said land or any part thereof without written per-

mission being first obtained from the said parties of the first part.

“And it is hereby agreed that the said party of the second part shall have the *preference right to re-lease said land* as provided by the laws of said state. If at any time after the execution of this lease it is shown to the satisfaction of the parties of the first part that there has been any fraud or collusion upon the part of the second party to obtain the same, said lease shall be declared null and void at the option of the parties of the first part.

“And it is hereby expressly agreed and understood that a violation of any of the terms of this lease, or the laws of the State of Oklahoma, concerning the public lands of said state by the said party of the second part shall subject this lease to cancellation and upon proof of the violation of any of the terms of said lease or said laws being made to the Commissioners of the Land Office of the State of Oklahoma such Commissioners of the Land Office shall have the right to cancel and declare the same null and void and of no effect and take possession of said premises and re-lease the same as by law provided.

“This lease is executed in duplicate.

“In witness whereof, the said parties have caused their signatures to be subscribed hereto on this 2nd day of January, 1913.

“COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA.

“By Lee Cruce,

“Chairman.

“Attest:

“Jno. R. Williams, *Secretary*.

“WILLIAM T. PRICE, *Lessee*.”

To the amended petition the defendants in error, Price, filed on the 18th day of November, 1920, their answer to the amended petition, on which answer the cause was tried. The material parts of the answer being as follows (appearing Record, pages 26 to 52, inclusive):

Answer to Amended Petition.

“Come now the defendants, William T. Price and Ora Price, and for their answer to the plaintiff’s Amended Petition, allege and state:

“FIRST COUNT.

“Defendants allege that the plaintiff is the owner of and interested in pipe lines and transportation of oil and gas, both in Oklahoma and Texas, and is affiliated and confederated with companies and persons engaged in operating pipe lines and transportation of oils and gas both in Oklahoma and Texas, and by reason thereof the plaintiff herein cannot hold an oil and gas lease upon the public lands in the State of Oklahoma, and that any purported lease upon the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west of the Indian Meridian to the plaintiff is, for that reason, null and void.

“SECOND COUNT.

“1. Defendants deny each and every allegation therein contained, excepting such as are hereinafter specifically admitted.

“2. Defendants deny that the State of Okla-

homa is the absolute owner of the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west, and alleges that the title of the State of Oklahoma and of these defendants is as hereinafter set out.

“3. That under and by virtue of the Acts of Congress the President of the United States was authorized and empowered from time to time to reserve and set aside for the Territory of Oklahoma, and other territories, certain lands for public schools, penal institutions and public buildings, and that the President of the United States did set aside for such purposes sections 16 and 36 and sections 13 and 33, in Oklahoma Territory, and that under and by virtue of the Act of Congress approved June 6, 1900, 31 Stat. L. 680, Congress did set aside, together with other lands, section 33 for the Territory of Oklahoma and the future State of Oklahoma, and reserved said lands from sale or homestead entry. That said act applies to, and covers the lands involved in this controversy.

“4. That under and by virtue of the Acts of Congress, and the Rules and Regulations of the Department of the Interior, prior to statehood, the Honorable Governor of the Territory of Oklahoma, the Honorable Secretary of the State of Oklahoma, and the Honorable Superintendent of Public Instructions of the Territory of Oklahoma were constituted a board for the leasing of public lands in the Territory of Oklahoma, and under and by virtue of said Act of Congress and said Rules and Regulations of the Secretary of the Interior and the laws in force at said time said board did execute leases to the public lands within th Territory of Oklahoma, and on that tract of land involved in this controversy, as hereinafter shown by leases set out.

“5. That under and by virtue of an Act of Congress approved June 16, 1906, commonly known as the Enabling Act, Section 33, together with other lands in the territory comprising Oklahoma Territory and including the lands in controversy, were granted to the State of Oklahoma upon certain conditions, limitations and covenants with respect to their disposition and sale.

“6. That under and by virtue of Section 10 of said Act of Congress approved June 16, 1906 (commonly known as the Enabling Act), provision is made for the sale of Sections 13 and 33, including lands in controversy, and giving to the lessee the Preference Right to purchase in the following language, to wit:

“‘Preference Right to purchase at the highest bid being given to the lessee at the time of such sale.’

“Said Act also provides that the Rules and Regulations for the sale of said land shall be as prescribed by the Legislature of said state, and also provides for the appraisement of said lands by three disinterested appraisers, non-residents of the county wherein said lands are situated, and the said appraisers so designated are required to make a true appraisement of said land at the actual cash value thereof, exclusive of improvements, and separately appraise the improvements at their fair and reasonable value, and that no sale shall be had for less than the appraised value of the land. That said Section 10 is as follows, to wit:

“‘That said sections thirteen and thirty-three, aforesaid, if sold, may be appraised and sold at public sale, in one hundred and sixty-acre tracts or less, under such rules and regulations as the legislature

of said state may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods of not more than five years, under such rules and regulations as the legislature shall prescribe, and until such time as the legislature shall prescribe such rules, these and all other lands granted to the state shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for designated purposes only, and until such time as the legislature shall prescribe as aforesaid said land shall be leased under existing rules; *Provided*, That before any of the said lands shall be sold, as provided in Sections nine and ten of this Act, the said land and the improvements thereon shall be appraised by three disinterested appraisers, who shall be non-residents of the county wherein the land is situated, to be designated as the legislature of said state shall prescribe, and the said appraisers shall make a true appraisal of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereon at their fair and reasonable cash value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall under such rules and regulations as the legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements, and to the state the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract of land less than the appraisalment thereof shall be accepted.'

"7. Section 22 of said Act approved June 16, 1906, commonly known as the Enabling Act, re-

quired the Constitutional Convention of the State of Oklahoma to irrevocably accept the terms and conditions of this Act as follows, to wit:

“That the Constitutional Convention provided for herein, shall, by ordinance irrevocable, accept the terms and conditions of this Act.’

“8. That thereafter and pursuant to the requirements and the privileges granted under the Enabling Act, the people of the proposed State of Oklahoma held their Constitutional Convention and said Constitutional Convention, duly assembled in said State of Oklahoma; did, on the 22nd day of April, 1907, pass the following ordinance, irrevocably accepting the terms, conditions and limitations of the Enabling Act in the following language, to wit:

“‘Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, “An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitutional and State Government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states.” Approved June the sixteenth, *Anno Domini*, nineteen hundred and six.’

“9. And that the said Constitutional Convention did adopt and the people thereafter ratified the said Constitution by accepting all grants of land and donations made to the said proposed state by the United States under the Enabling Act for the

uses and purposes and particularly Section one of Article eleven of said Constitution, in the following language, to wit:

“ ‘The state hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act, and any other Acts of Congress, for the uses and purposes and upon the conditions, and under the limitations for which the same are granted or donated; and the faith of the state is hereby pledged to preserve such lands and moneys and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated.’ ”

“10. The defendants further allege that under and by virtue of the Act of Congress approved May 4, 1894, the Rules and Regulations adopted by the Secretary of the Interior, the Honorable Thomas B. Ferguson, Governor, and William Grimes as Secretary, and L. W. Baxter as Superintendent of Public Instructions, all of the Territory of Oklahoma, constituting the Board for leasing land reserved for school and public buildings in the Territory of Oklahoma, did make and enter into a certain lease contract with one William T. Click on the 8th day of January, 1902, covering the Northeast Quarter of Section Thirty-three (33), Township One (1) South, Range Eight (8) West, and covering a period of time from the first day of January, 1902, to the first day of January, 1905; a copy of said lease contract is hereto attached, made a part hereof and marked defendant's ‘Exhibit A.’ ”

Sections 11 to 20, inclusive, of the amended answer are allegations of the execution and delivery

of various preference right leases issued by the School Land Commissioners to Price and his predecessors in title, the first one being executed on the 8th day of January, 1902, down through to Price.

“21. Defendants further allege that at the time of the passage of the Enabling Act and approval thereof, to wit, on June 16, 1906, and at the time of the adoption of the Constitution of the State of Oklahoma, and for more than ten years thereafter, the said lands hereinbefore described were not known or classed as mineral lands.

“22. Defendants further allege that by virtue of the provisions of Section 1 of Article 4 of Chapter 49 of the Acts of the Legislature for the Session of 1907-1908, and others acts, the Commissioners of the Land Office of the State were required to set aside such lands as were known to be mineral in character, and to segregate the minerals from the surface use and interest therein.

“Said defendants allege and state that said acts if applied so as to segregate the minerals including oil and gas in the lands hereinbefore described so as to deprive the defendants of their Preference Right to purchase said land and all thereof, would be unconstitutional and void as to them insofar as it attempts to take away from these defendants such Preference Right to purchase said interest. And would be violating the provisions of the Constitution of the United States of America in depriving these defendants of their property without due course of law. That said Section 1 reads as follows:

“ ‘When any tract of the school land and other public lands granted to the State of Oklahoma under

the Act of Congress known as the "Enabling Act" is, by the Commissioners of the Land Office of the State, known to contain oil or gas, or where such lands are, by said Commissioners, deemed valuable for oil and gas purposes, such Commissioners shall enter of record in their office, their finding declaring that such oil or gas character exist, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act.'

"23. That under and by virtue of Article 2 of Section 28 of the Laws of the State of Oklahoma for the year 1909, approved March 2, 1909, the Commissioners of the Land Office of the State of Oklahoma, were directed by the Legislature to dispose of, sell and convey the lands known as indemnity lands in the State of Oklahoma, and Section 33.

"24. That acting under the provisions of law, said Commissioners of the Land Office did cause the lands hereinbefore described, together with the other lands in said section and in said vicinity to be appraised according to the terms and requirements of the Enabling Act for sale purposes and the lands hereinbefore described were appraised by three disinterested appraisers, non-residents of the county in which said lands are located, at the sum of _____ dollars, and the improvements were appraised at the sum of _____ dollars.

"Defendants further allege that under and by virtue of said appraisal so made, the said Commissioners of the Land Office did advertise and sell the other three quarter sections in said section thirty-three (33) and certain indemnity lands in section

thirty-four (34), in the said township and range, and other lands located in the vicinity of the lands in controversy, but wholly failed and neglected to offer for sale the lands of these defendants, although required by law to do so.

“25. Defendants further allege that at the time of said appraisalment the defendants and their predecessors had improved said lands by reducing the same to a high state of cultivation, fencing the same, building a house and barn thereon, setting out and cultivating for a period of four years an orchard of something over four hundred trees and were occupying said lands at said time as they had been therefore as their homestead and with the intention of making said lands their home.

“26. Defendants further allege that in disregard of the right of the defendants, the said Commissioners, although directed so to do by the Legislature of the State of Oklahoma, failed and neglected since 1909, to cause said lands to be advertised and sold as required thereby and that the defendants have at all times been ready, willing and able to do all things required of them by the Enabling Act in order to prove their title to said lands, and that the Commissioners of the Land Office of the State of Oklahoma, in disregard of the right of these defendants under their said lease, and their right to exercise their privilege of buying said land at the highest bid therefor, did on or about the 4th day of January, 1919, make, execute and deliver to the Magnolia Petroleum Company certain oil and gas mining lease which is attached to and made a part of the plaintiff's Amended Petition; said lease was made to the said Magnolia Petroleum Company without any knowledge or consent upon the part of these defendants, or either of them, and without any cancella-

tion or other disposition of the leasehold by the defendants herein on said lands, and without giving to these defendants any preference right to purchase a lease for oil and gas purposes. That the effect of the giving of said lease and development of said land under said lease for oil and gas purposes would be to denude said lands of a very material part of their value, to deprive defendants of the possession of said lands, the use and occupancy thereof and if said plaintiff is permitted to operate under said lease and drill and operate wells upon said land to the exclusion of the defendants, it would deprive defendants of their preference right to purchase said lands, and will make said land valueless for any purpose except under such oil and gas lease so executed to the plaintiff.

“27. That the defendants have valuable rights in and to said lands under their preference right to purchase the same, and under and by virtue of their right to the use and occupancy of the same, and that the making of said lease deprives these defendants of all of said rights without compensation and in violation of the due process under the Constitution of the State of Oklahoma and the Constitution of the United States of America.

“28. Defendants further allege that the Resolution set out in paragraph 3 of Plaintiff's Amended Petition as having been passed by the Commissioners of the Land Office of the State of Oklahoma, was made without authority of law, and is of no force and effect. That said Resolution was passed without the knowledge of the defendants or either of them, and without any compensation being allowed defendants for their rights and claims in and to the said lands, and such purported action of the said Board was in direct violation of the instruc-

tions and directions made to said Board by law, and by the State of Oklahoma, with respect to the sale and disposition of said lands involved and claimed by defendants. That said resolution deprives defendants of their property without due process of law guaranteed to them under the Constitution of the State and of the United States and impairs and deprives them of the rights granted to them under the Enabling Act.

"29. Defendants further allege that any and all acts of said Board of School Land Commissioners and any and all acts of the Legislature that deprives these defendants or either of them from their Preference Right to purchase said lands, or of their rights in said lands as a homestead, does so without compensation and without due process of law.

"30. Defendants further deny that the purported oil and gas lease granted plaintiff gives it any rights to the possession of said lands, or any part thereof, and that the purported action of said Board is in direct violation of their duty under the law of which the plaintiff herein is charged with notice and deprived these defendants of their rights in and to said lands guaranteed them under and by virtue of the Constitution of the State of Oklahoma and of the United States.

"31. Defendants further allege that at the time of the delivery of the lease and the Extension Certificate thereto, marked 'Exhibit A' and 'Exhibit C,' and attached to plaintiff's Amended Petition, defendants did not thereby surrender their Preference Right to purchase said lands, or the homestead character of said lands. That the consideration named in said lease was the rental value of the lands at said time, and no amount was by defendants received as a consideration for the re-

lease by defendants of their Preference Right to purchase said lands, and defendants have consistently maintained and claimed their Preference Rights to said lands, and have at all times done all things required by them by law, to hold and perfect their title thereto, and have in good faith at all times maintained their residence as a home thereon, with their family, and cultivated the said lands and built and maintained the permanent improvements thereon. Defendants and each of them have at all times since their purchase of the said rights of the said DeArman to said lands claimed and asserted their Preference Rights to purchase said lands and their homestead rights thereto, and have never at any time surrendered, eliminated, waived or abandoned their said Preference Right to purchase said lands, or their homestead in said lands.

“33. Defendants further allege that Section 3, Article IV, Chapter 49, Session Laws 1907-08, is in violation of the provisions of the Enabling Act and of Section 1, Article 11, of the Constitution, accepting the grants of public land by the United States to the State of Oklahoma, in that it attempts to authorize the leasing of all public lands granted to the state without regard to the time of such lease, and for terms in excess of the period fixed by Section 8 of the Enabling Act, and that the oil and gas lease held by the plaintiff was made in violation of the terms of the Enabling Act accepted by the State Constitution, and in violation of the authority given, or attempted to be given by said Section 3, Article IV., Chapter 49, Session Laws 1907-08, if said section be held valid in itself. And said Section 3 and the act of the said Commissioners in executing said pretended lease to plaintiff, if upheld and enforced, violates the Fourteenth Amend-

ment of the Constitution of the United States as to defendants in that it takes and will have the effect of taking defendants' property without compensation and without due process of law.

"34. Defendants further allege that Articles III. and IV. of Chap. 49, Session Laws 1907-08, approved May 26, 1908, together with the revision of said Statutes as found and contained in Articles III. and IV., Chap. 69, Revised Laws 1910, and all acts amendatory of such original or revised statutes, or which, whether in the form of a revision or amendment, or by new enactment, undertakes to segregate the mineral or oil and gas deposits from the surface uses and interests in Section 33, granted to the State of Oklahoma, by the terms of the Enabling Act, and accepted by Section 1 of Article 1 of the Constitution, for the uses and purposes and upon the conditions, and under the limitations therein contained, and which statutes, or any rule or regulation attempted to be made pursuant thereto, undertake to confer power upon, or to authorize the Commissioners of the Land Office to segregate the minerals, oil and gas deposits on or under such lands from the surface uses and interests therein, and all acts done by the said Commissioners of the Land Office and their officers, agents and employees, or any other officers, agents and employees of the State, acting under or pursuant to such statute, or any purported rules or regulations of such Board of Commissioners, or under color of authority of any statute, rule or regulation and particularly of any statute, rule or regulation, or action of the Commissioners of the Land Office in attempting, on August 26, 1915, as charged in plaintiff's Amended Petition, to declare the land theretofore leased to the defendant, William T. Price, to be valuable for oil and gas purposes and to segregate the oil and

gas deposits belonging thereto and forming a part of such lands in their native state, from the surface uses and interest therein, and withdraw the same from sale, as well as to authorize the leasing of such lands, already leased, for oil and gas purposes, and in making and entering into the lease of January 4, 1919, with plaintiff, and through which it claims the right of entry and title to the oil and gas on the lands theretofore leased to defendant as construed and as applied to William T. Price, and the lands to which he was, by law, given the Preference Right of purchase, is repugnant to and violates not only Sections 2, 7, 15 and 23 or Article 11 of the Constitution of the State of Oklahoma, but the Fourteenth Amendment to the Constitution of the United States, in that such statute and all acts done pursuant thereto, or under color of authority thereof, as construed and applied to defendants deprives the defendants of liberty and property without due process of law and without compensation, and denies to the defendants the equal protection of the laws.

“35. And defendants claim the protection of the Constitution of the United States and the Amendments thereto, and particularly the Fourteenth Amendment, and invokes the vested jurisdiction of the Court, and, in due course, of the Supreme Court of Oklahoma, and, if necessary, ultimately of the Courts of the United States, for protection of the rights of said defendants and each of them and of their liberty and property in the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west, in Stephens County, and of their equal protection of the laws, and for due process of law.

“36. Wherefore, defendants pray judgment and ask that plaintiff take nothing by its suit, and

that defendants recover their costs, for injunction cancellation of oil and gas lease, accounting, etc., and general equitable relief.”

That thereafter on the 13th day of December, 1920, the State of Oklahoma, by and through the Commissioners of the Land Office and the Attorney General of the State, served notice upon the plaintiffs in error that they would file a petition of intervention (Record, pages 53-54), and

That thereafter on the 3rd day of March, 1921, said State of Oklahoma, *ex rel.*, the Commissioners of the Land Office of the State, and *ex rel.*, S. P. Freeling, Attorney General of the State, filed their petition of intervention (Record, pages 54-59), the material parts of which are as follows:

“Petition of Intervention.

“Comes now the State of Oklahoma, *ex rel.* the Commissioners of the Land Office of said State, and *ex rel.* S. P. Freeling, Attorney General of said State, George E. Merritt, Law and Executive Clerk of the Commissioners of the Land Office of Oklahoma, and, complaining of the plaintiff and defendants in the above entitled action, for cause of action herein alleges and says:

“That the State of Oklahoma, by virtue of the Enabling Act, creating the State of Oklahoma, and the ordinance accepting the terms of such Enabling Act, and the Constitution of said State, is the owner

of the following described real estate, situate in Stephens County, Oklahoma, to wit:

“The Northeast Quarter of Section 33, Township 1 South, Range 8 West.

“Intervenor further alleges that, pursuant to House Bill No. 414, Article 2, of the Session Laws of 1907-08, the Commissioners of the Land Office proceeded to appoint appraisers, and which said appraisers, as soon as practicable, proceeded to appraise all of the lands granted to the State of Oklahoma, for educational and public building purposes, and did appraise the above described tract of land and file their report in the office of the Commissioners of the Land Office.

“Intervenor further alleges that, pursuant to Senate Bill No. 1, Article 2 of Chapter 28 of the Session Laws of 1909, which authorized the Commissioners of the Land Office to sell and convey the school and other public lands of the State of Oklahoma upon the appraisement for the year 1908, the Commissioners of the Land Office notified the defendant, William T. Price, the lessee then in possession of the above described lands, of the appraised value of his improvements, and the said defendant, William T. Price, being dissatisfied with the appraised value of his improvements, did notify the Commissioners of the Land Office of his dissatisfaction therewith; whereupon the said land covered by said lease contract with the said William T. Price was reserved from sale pending a review of said appraisement.

“Intervenor further alleges that on the date said appraisement was made one William T. Click was the lessee of record of said tract of land and in possession of the same; that during the interval be-

tween the date of said appraisalment of 1908 and the date of notifying the lessee of the above described lands of the appraised value of his improvements, that the defendant, William T. Price, by proper relinquishment and extension certificates, became the agricultural lessee of said lands.

“Intervenor further alleges that the said lands above described were leased lands, and the said defendant, Price, was the lessee of same, and that the said Price did not at any time or has not at any time presented an application or petition for the sale of the said lands, and has not at any time presented a petition to the Commissioners of the said Land Office asking for a sale of the said tract so leased to him.

“Intervenor further alleges that on the 26th day of August, 1915, the said Price was in possession of the said tract and holding the same as an agricultural lessee, as provided by the laws of said State, a copy of which said lease is attached to the plaintiff's Amended Petition, and here referred to and made a part of this petition of intervention, and that on the said date the Honorable Commissioners of the Land Office, acting under the provisions of Senate Bill No. 338, Session Laws of 1907-8, determined that the said land was known to contain oil or gas and was deemed valuable for oil and gas purposes, and did enter of record in their office their finding declaring that such oil and gas character exists, and that the same was valuable for oil and gas purposes, and further declaring that the oil and gas deposits were segregated from the surface use and interest therein, and such segregation of such deposits did conclusively withhold the same from sale, lease or other alienation, except as provided by the said Senate Bill No. 338. A copy of

said order of segregation is incorporated in the plaintiff's Amended Petition, and hereby referred to and made a part of this petition of intervention.

“Your intervenor further alleges that immediately after such segregation it proceeded to advertise and sell a lease upon the said land for oil and gas purposes, and on the 20th day of November, 1918, caused notice to be duly given for sealed bids for the leasing of the said tract of land for oil and gas purposes, subject to a one-eighth royalty reserved to the State, and that on the 31st day of December, 1918, the Magnolia Petroleum Company filed its sealed bid, offering to pay a bonus of \$8,000.00 for an oil and gas lease on said tract of land, and the said bid being duly opened, the consideration of the same was continued until January 4, 1919, and that at a regular session of the said Commissioners of the Land Office, held on the 4th day of January, 1919, the said bid of the Magnolia Petroleum Company was duly accepted and a lease ordered issued therefor to the said plaintiff in this action. And that thereafter, to wit, on the said 4th day of January, 1919, the said Commissioners of the said Land Office of the State of Oklahoma, by R. L. Williams, Governor, and Chairman of said Board, attested by A. M. McKinney, Secretary of the Commissioners of the Land Office, did execute an oil and gas mining lease to the said Magnolia Petroleum Company, John Sealy, E. R. Brown, R. Waverly, Smith, E. E. Plumly and George C. Greer, as trustees, a copy of which said lease is attached to plaintiffs' Amended Petition and here referred to and made a part hereof.

“Your intervenor further alleges that the said defendant, Price, was the owner of an agricultural

lease upon the said tract of land and had no right to and was not possessed of any right, title or claim to the oil and gas under said premises, or any part thereof, and held his agricultural lease upon the said premises, subject to the rights of the State and the State's lessee mining the said premises for oil and gas or other minerals.

"Intervenor further alleges that under and by virtue of the provisions of the said lease, made with the said plaintiff, that it is entitled to one-eighth of the oil or gas produced by and under said royalty interest.

"Intervenor further alleges that the interference by the said defendant with the plaintiff in said cause, in the entering upon the said premises to drill wells, discover and produce oil and gas, prevents the State of Oklahoma, intervenors herein, from receiving its royalty, as in said lease provided, and is thereby causing the said intervenor irreparable injury and damage; that many wells are being drilled in the immediate territory surrounding the said tract, and the said tract will be drained of large quantities of its oil and gas, unless same is properly developed. The extent of such drainage cannot be ascertained or determined.

"Intervenor hereby adopts as a part of this petition in intervention all of the allegations of plaintiffs' Amended Petition and exhibits attached thereto, and makes the same a part hereof as though fully re-written herein.

"Intervenor alleges that under the laws of said State the intervenor is the one entitled to all the oil and gas produced from said tract, except so far as same may be granted under the terms and conditions of the oil and gas mining lease made to the

plaintiff herein, and that the defendants have no interest in any such oil or gas, and are unlawfully and wrongfully asserting any claim thereto, and unlawfully and wrongfully attempting to prevent the intervenor and its lessee, the plaintiff herein, from developing and producing such oil and gas.

“Intervenor further alleges that the said plaintiff, as provided by the laws of said State, has executed a bond and filed the same with the Secretary of the Commissioners of the said Land Office, as required by law, by the terms and conditions of which the said plaintiff stipulated and agreed to pay any damages that may be suffered by the said defendant by reason of entering upon the said tract for the purpose of producing oil and gas, and that the amount so owing to the defendants, damages to their surface and agricultural rights, ought to be ascertained and determined, and the plaintiff be required to pay said amounts to the defendants, as by law provided.

“Wherefore, intervenor prays that the said defendants, and each of them, be enjoined from in any wise interfering with the intervenors and its lessee, the plaintiff herein, in the operation of the said premises for oil and gas, and the development of the oil and gas therein, and the production thereof, and that their claim to any of the oil or gas produced therefrom be adjudged unfounded and invalid, and that the intervenor be adjudged and decreed to be the owner of all oil, gas and other mineral rights therein, subject to leases now made by the said Commissioners or hereafter to be made, under the terms and provisions of the laws of said State, and for such other and further relief as un-

der the premises the intervenor is entitled to, and for costs.

“S. P. FREELING,
“*Attorney General of the State of Oklahoma.*

“GEO. E. MERRITT,
“*Law and Executive Clerk.*”

That thereafter on the 3rd day of March, 1921, plaintiffs in error filed their answer to the petition of intervention (Record, pages 59-61), the material parts of which are as follows:

“*Answer to Petition for Intervention.*

“Come now the defendants, and each of them, and for answer to the petition of intervenors filed upon part of the State of Oklahoma, allege and state:

“1. That pursuant to the stipulation made between the parties in said action said defendants file their amended answer to the petition of plaintiffs as their answer to the petition of intervention by the State of Oklahoma, and make the same a part hereof as though fully set out herein in so far as the same may be applicable to the said petition of intervention.

“2. Defendants deny each and every allegation contained in the said petition of intervention except such allegations as are alleged to be true in said amended answer and admitted to be true herein.

“3. Defendants admit that the State of Oklahoma have recognized defendant, William T. Price, as the lessee of the lands involved from and prior

to the first appraisalment made by the State of Oklahoma for sale purposes in January, 1909, and until this date.

“4. Defendants specifically deny that they did anything that warranted the Commissioners of the Land Office in reserving said lands from sale or refusing to sell the same and allege that the appraisalment of 1909 was duly and regularly approved by the Commissioners and that the defendants at no time availed themselves of the right under the law to appeal from said appraisalment and that said appraisalment became final and conclusive between the parties.

“5. Defendants further allege that subsequent thereto and in 1915, said land again was appraised for said purposes and that said appraisalment was accepted by the defendant, William T. Price, and that said appraisalment became final and no appeal was taken by the said defendants from said appraisalment.

“6. Defendants further state that by reason of the neglect and failure of the Commissioners of the Land Office, the intervenors herein, to sell the land as provided by law and at the time provided by law that the defendants are entitled to relief against said Commissioners, adjudging the defendant, William T. Price, to be the equitable owner of the land in controversy and entitled to a certificate of purchase thereto, and that defendants hereby offer and tender in court, if it should be adjudged by the court that the defendants should do so, the rental on said land for the year 1920, which matured in October, 1920, during the pendency of this action, and the defendants further allege that they are ready, willing and able to purchase said land

and offer and tender to pay in court such amounts of the purchase price as the court may determine to be just and equitable in the premises.

“Wherefore, defendants pray the judgment of the court according to the prayer of the amended answer filed herein, and further pray that they be adjudged to be the equitable owners of said land and the right to purchase said land and for such other and further relief as the court may deem just and equitable.

“STUART, SHARP & CRUCE,

“STEVENS & RICHARDSON,

“BLAKE & BOYS,

“Attorneys for Defendants.”

That thereafter the defendants in error each filed their reply to the answer of the plaintiffs in error, being in the form of a general denial and especially denying that William T. Price has a preference right to purchase said lands (Record, pages 61-62).

Pursuant to these pleadings the court granted leave for the State of Oklahoma to intervene as requested and several motions and demurrers were acted on by the court, which are here immaterial.

Prior to the trial of the cause in the court below, counsel for the respective parties entered into numerous stipulations of fact under an agreement

that either party could offer such parts of the same as such party might desire, subject to any objections or exceptions that the other party might desire to make.

Upon these pleadings so filed in the District Court of Stephens County, Oklahoma, the cause was tried and the trial court, upon these pleadings and the evidence introduced, entered his decree in which he made many findings of fact and conclusions of law and decreed that the plaintiffs in error herein were equitable owners of the land involved. This decree of the trial court was unattacked by opposing counsel in the Supreme Court, except on the legal questions, and I assume that their attitude will be the same in this Court.

In view of the findings of the court it will not be necessary to go into the evidence, except in special instances where it may show the attitude of the State, or to show how well the findings of fact were supported by the evidence. The decree rendered, with the exception of the formal parts and that part which makes the record for appeal from the trial court, is as follows and appears Record, pages 152-159, inclusive:

“(1) That the temporary injunction heretofore issued and continued in said cause was wrongfully issued and continued, and that the same should be dissolved and held for naught.

“(2) That the oil and gas lease held by plaintiff, Magnolia Petroleum Company, executed by the Commissioners of the Land Office on the 4th day of January, 1919, and which is referred to and marked ‘Exhibit A’ to plaintiff’s Amended Petition, is null and void, and of no force and effect as against the defendants herein, William T. Price and Ora Price.

“(3) That the lands in controversy have been leased by the proper authorities of the Territory of Oklahoma since the 8th day of January, 1902, with the preference right to re-lease, all being done under and by virtue of the Acts of Congress and the Rules and Regulations then, and until statehood, in force, and have at all times since statehood been leased by the proper state authorities to the present time, with the preference right to re-lease and preference right to purchase as provided by the Enabling Act and the valid laws of the State of Oklahoma authorizing the sale of public lands.

“(4) That the defendant, William T. Price, purchased the lease and improvements on the lands involved, and the preference right to re-lease and the preference right to purchase the lands involved, during the fall of 1908, and has continuously occupied and held said lands under such preference right lease as provided by the Enabling Act and laws of the state since said date, and that the Commissioners of the Land Office and the State of Oklahoma, have recognized his preference right to re-lease and his preference right to purchase, as pro-

vided by law at all times since the time of the filing and acceptance of the relinquishment from his predecessor in title, L. B. De Arman, on or about the 15th day of October, 1909, to and including the present time.

“(5) That since the said purchase by said Price, he has continuously occupied said land with his family as his homestead and has at all times asserted his claim to title in and to said land.

“(6) That on or about the 12th day of January, 1909, the said lands were appraised under directions of the Commissioners of the Land Office for sale purposes at Three Thousand Dollars (\$3,000.00), and that no appeal was taken from said appraisement by the said William T. Price, and the said appraisement became thereby finally fixed and adjudicated as the true appraised value of said land for sale purposes, and that the said sum of Three Thousand Dollars (\$3,000.00) was the fair and reasonable value of the land, exclusive of improvements, at the time that said lands should have been sold by the Commissioners as provided by the laws of the State of Oklahoma.

“(7) That the Commissioners of the Land Office have wrongfully failed and neglected to sell said land as required of them by the laws of the State of Oklahoma.

“(8) That the said defendant, William T. Price, has at all times been ready, willing and able to comply with any and all provisions of law relative to the purchase of said lands and did demand of the Commissioners of the Land Office and of their agents and representatives entrusted with the sale of said lands, that the same be sold, which was refused.

“(9) That the defendant, Price, was a qualified person under the law to hold a lease to said lands and to exercise his preference right to release said lands and his preference right to purchase the same, and had acquired and now has a vested right in and to said land.

“(10) That the defendant, William T. Price, is the equitable owner of the title to said premises and is entitled to have his record title to the said lands made perfect upon the payment of the purchase price of Three Thousand (\$3,000.00) Dollars as provided by law.

“(11) That the land in controversy was not valuable for minerals, oil or gas, or known to contain oil or gas, prior to discovery thereof in the year 1920, and after the commencement of this action.

“(12) That the defendants, William T. Price and Ora Price, are entitled to an injunction against the plaintiff, the Magnolia Petroleum Company, and against the State of Oklahoma, and the Commissioners of the Land Office of the State of Oklahoma, enjoining them and their successors, and their agents, servants and employees, and their successors in office, from in any way interfering with the possession of the defendants in and to said lands, or interfering in any way with the rights and title of said defendants.

“(13) And the Court finds not only the foregoing facts and issues of fact in favor of defendants herein, but finds all other facts in this cause and issues of law and fact in favor of defendants.

“It is, therefore, ordered, adjudged and decreed as follows:

“(1) That the plaintiff, Magnolia Petroleum

Company, John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumley and W. C. Proctor, as trustees, take nothing by their suit, and that the temporary injunction heretofore granted, and afterwards continued against defendants, William T. Price and Ora Price, be dissolved, vacated, set aside and held for naught. That the plaintiff having gone upon the lands hereinafter described in paragraph 2 of this decree, under the authority of the temporary injunction heretofore wrongfully obtained and improvidently granted and continued, the said plaintiff is hereby ordered and directed to quit and vacate and abandon that part and parts of the premises occupied by it, and if said plaintiff does not quit and vacate said premises, or any part thereof, within thirty (30) days from the date of this decree, the Court Clerk is hereby directed upon the expiration of said thirty (30) days and upon the filing of an affidavit by the defendant showing that said plaintiff has not quit and vacated said premises, as required herein, to issue a writ directed to the Sheriff of Stephens County, Oklahoma, directing the said Sheriff to remove said plaintiff and all its trustees, officers, agents and employees from any and all parts of said land.

“(2) That the plaintiff, Magnolia Petroleum Company, John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumley and W. C. Proctor, as trustees, its or their successor or successors, agents, servants and employees, be, and they are hereby enjoined from trespassing or going upon or exercising any claim of possession, right or authority over, or in any way interfering with or obstructing defendants in the exercise of their respective rights, title and possession in and to the Northeast Quarter (NE $\frac{1}{4}$) of Section Thirty-three (33), Township

One (1) South, Range Eight (8) West of the Indian Meridian, in Stephens County, Oklahoma.

“(3) That the Commissioners of the Land Office of the State of Oklahoma, and their successors in office, and their agents, servants and employees, together with such other officers of the state having, or claiming to have, authority in the premises, and each of them be, and they are hereby enjoined from exercising any alleged right or authority over, or in any way interfering with or obstructing defendants, in the exercise of their rights, title and possession in and to the tract of land named and described in the foregoing paragraph.

“(4) That the oil and gas lease executed by the Commissioners of the Land Office of the State of Oklahoma to the plaintiff, the Magnolia Petroleum Company, on the 4th day of January, 1919, a copy of which is attached to plaintiff's Amended Petition and marked 'Exhibit A,' is hereby declared to be void as to the defendants, William T. Price and Ora Price, and the same is hereby adjudged to be set aside and held for naught, and the plaintiff, and its trustees, officers and agents, be, and they are hereby ordered and directed to execute a proper release of said oil and gas lease within thirty days from the date of this decree that will effectually release such oil and gas lease from being a cloud on the title to said lands. And if the said plaintiff shall fail to execute such release within said thirty days, it is further ordered, adjudged and decreed that this decree shall be a full and complete release of said oil and gas lease so held by the plaintiff herein, and that a certified copy of this decree may be filed with the County Clerk of Stephens County, Oklahoma, and with the Secretary of

the Commissioners of the Land Office of the State of Oklahoma by the defendants herein.

“(5) That the defendants, William T. Price and his wife, Ora Price, have, and have had at all time since their purchase, a vested right in and to said lands and have done all things required of them under the law, and are the owners and holders of the equitable title to said lands. That the sum of Three Thousand Dollars (\$3,000.00) is, and was the fair, and reasonable value of said lands, exclusive of the improvements owned by the said defendants, at the time said lands should have been sold by the Commissioners of the Land Office, and the State of Oklahoma by and through the Commissioners of the Land Office, is hereby ordered and directed to make and execute to the defendant, William T. Price, a patent in fee in the usual form, upon the payment by the said William T. Price of the sum of Three Thousand Dollars (\$3,000.00), together with interest thereon at the rate of five per cent (5%) from January 19, 1911, less the amounts paid as rentals since January 19, 1911, together with interest on amounts paid as rentals at the rate of five per cent (5%) from the date of each respective payment.

“(6) That the plaintiff, the Magnolia Petroleum Company, be, and it is hereby, directed to account for all oils, gas and other minerals taken from said lands, and for all items of loss and damage that it may have occasioned to said lands by reason of going upon the same under and by virtue of its oil and gas lease and the temporary injunction heretofore issued in this cause; and the Court reserves jurisdiction of this cause for the further taking of testimony and hearing on the matters and things set out in this paragraph, on both ques-

tions of law and fact, and sets the hearing of the same for the 6th day of May, 1921.

“(7) That the action of the Commissioners of the Land Office in leasing said lands to plaintiff for oil and gas purposes, violated the rights guaranteed to the defendants by the Constitution of the State, the Constitution of the United States and the laws of the United States.

“(8) That a receiver be appointed to take charge of the mineral development in and of said lands and the Honorable Ed. J. Kelly is hereby appointed such receiver until the further order of this Court, upon the giving of a bond in the sum of Fifty Thousand Dollars (\$50,000.00), to be approved by this Court, or the judge thereof, and the taking and filing of the usual oath of office; and upon the execution and approval of said bond and taking of said oath of office, he shall proceed to take charge of said lands, and of all and any of the oil and gas wells, pipes, tanks, pumps, buildings, machinery and appliances of all and every kind used, or connected with the oil and gas and mineral development of said lands. Also to take charge of all oil, gas and mineral production thereon, the storage, handling, sale and disposition thereof, and keep an accurate account of all oil and gas produced thereon, and the expense occasioned in the production thereof, and collect the proceeds from all oil and gas produced and pay the necessary and proper expenses thereon, and to employ and discharge or retain such help and employees as may be necessary to properly operate such mineral development. That upon taking possession of said property, said receiver shall make and cause to be made a full and complete survey and inventory of the said property and make a full and complete report thereof

to the Court, and shall mail a true copy of said report to the Counsel for the respective parties in this cause. The said receiver is further directed not to take charge of the agricultural operations of the defendant, William T. Price. That the duties herein required of the receiver may be changed at any time by the Court upon proper notice to the parties in the action, and such further and other duties as may be required and necessary may be from time to time given him by the Court; but that said receiver shall have full authority to do and perform the things required of him pending the further orders of this Court.

“(9) That the defendants, William T. Price and Ora Price, have and recover of the plaintiff and of the intervenor, the costs of this action; to which judgment of the Court and each and every paragraph thereof, the plaintiff and the intervenor, each for itself, excepts and exceptions are allowed.”

ASSIGNMENTS OF ERROR.

The assignments of error appear at record pp. 204 to 213, and are as follows:

"Come now the defendants in error, William T. Price and Ora Price, and respectfully submit that in the record, proceedings, decision and final decision of the Supreme Court of the State of Oklahoma in the above entitled matter, there is manifest error, and in connection with the petition for writ of error herein makes the following assignment of errors which the defendants in error, William T. Price and Ora Price, aver occurred in the final order and judgment herein, dated the 21st day of March, A. D. 1922, re-hearing denied the 3rd day of May, 1922, as follows, to wit:

"I.

"That the court erred in holding that the provisions of the Statutes of Oklahoma, to wit, Act of May 26, 1908, appearing Session Laws 1907-08, page 490, and as in the Revised Laws of the State of Oklahoma, 1910, Ch. 69, Art. 3, page 1938 (effective May 16, 1913), and as amended in the Statutes of the State passed and approved the 3rd day of March, 1917, appearing Sess. Laws 1917, Ch. 253, at page 462 (Senate Bill No. 181), are not in conflict with the provisions of Act of Congress of June 16, 1906 (Enabling Act of Oklahoma), 30 Stat. L. 507, and with the Constitution of the United States, Section 10, Article 1, and Amendment XIV thereof, for that the State of Oklahoma by and through the provisions of said Statute, assumes and seeks to deprive the defendants in error, citizens of the United States and of the State of Oklahoma, of property and of

title, and of rights, privileges and immunities secured to citizens of the United States, and of said state, by the Constitution of the United States, and the Act of Congress of June 16, 1906, and Statute of Oklahoma, Sess. L. 1909, Ch. 28, Art. II; and to deprive the defendants in error, and other citizens of the United States of liberty and property without due process of law; and to deprive and deny the defendants in error and certain citizens and persons within the jurisdiction of the State of Oklahoma of the equal protection of the law; and to impair the contract of lessees, Price and Price.

“II.

“The court erred in holding that by the provisions of said Statutes of the State of Oklahoma, Sess. L. of 1907-08, and Sess. L. 1917, these defendants in error are not deprived of property, title, rights, privileges, and immunities, secured to them and other citizens of the United States, and of the State of Oklahoma, by the Federal Constitution, and the laws of the United States, to wit, the Act of June 16, 1906 (Enabling Act of the State of Oklahoma).

“III.

“The court erred in holding that by the provisions of said acts of the Legislature of the State of Oklahoma, cited in Assignment II, *supra*, the defendants in error are not deprived of liberty and property without due process of law.

“IV.

“The court erred in holding that the said Statute cited in Assignment II, *supra*, and the authority exercised thereunder, and thereby authorized to be exercised thereunder, are within the power of the

Legislature of the State of Oklahoma, and not in contravention of the Constitution of the United States, and the Fifth and Fourteenth Amendments thereto, and the Act of Congress of June 16, 1906 (Enabling Act).

“V.

“The court erred in holding that the provisions of said Statutes of the State of Oklahoma cited in Assignment II, *supra*, and the authority exercised thereunder and thereby authorized to be exercised thereunder do not unlawfully discriminate between the defendants in error and others similarly situated within the State of Oklahoma.

“VI.

“The court erred in holding that the said Statutes of the State of Oklahoma cited in Assignment II, *supra*, do not grant or permit special and exclusive privileges to certain citizens of the State of Oklahoma which they deny to defendants in error, and other citizens of the State similarly situated, and do not permit same to be done, contrary to the Constitution and laws of the United States.

“VII.

“The court erred in holding, and in entering the judgment in said cause, perpetually enjoining the defendants in error from interfering with the operation of the Magnolia Petroleum Company on the land involved under the mineral lease or grant complained of by defendants in error, and in decreeing the royalties of oil and gas produced under said lease to the State of Oklahoma; and in limiting the recovery of the defendants in error, ‘To such damages as they may have sustained to their agricultural

lease by reason of the operation of said oil and gas lease,' for and because by so doing it deprived defendants in error of property without due process of law; and abridged rights of the defendants in error and impaired the contract between the United States and the State of Oklahoma, and of defendants in error in violation of Act of June 16, 1906, and the Constitution of the United States, Art. 1, Section 10, and Amendment XIV.

“VIII.

“The court erred in holding and deciding that the defendants in error, William T. Price and Ora Price, had not the preference right to buy said land, in its entirety, under the grant of such right in and to said land so conditioned by the Act of Congress of June 16, 1906 (Enabling Act), and accepted by Constitution of Oklahoma, Article XI, Section 1, and Statute of Oklahoma, Sess. L. 1909, Ch. 28, Art. II, all accepted and asserted by defendants in error, Price.

“IX.

“The court erred in holding and deciding that the defendants below, William T. Price and Ora Price, defendants in error, had not the preference right to buy said land, and all thereof, under the contract between the State of Oklahoma and these lessees expressed in the Constitution of Oklahoma, Article XI, and the State of Oklahoma, Session Laws 1909, page 448, being Chap. 28, Art. II, accepted and asserted by defendants as lessees of said land, and especially set up and claimed under the Constitution and Laws of the United States.

“X.

“The court erred in holding and deciding that

as to defendants in error, William T. Price and Ora Price, the Statute of Oklahoma of 1907-08, page 490, Chap. 49, Art. IV, Revised Laws 1910, page 1938, Chap. 69, Art. III, and the Statute of Oklahoma, Session Laws 1917, Chap. 253, page 462, did not impair, contrary to Article 1, Section 10, of the Constitution of the United States and the Fourteenth Amendment to said Constitution, the contract between the United States and the lessee, Price, and between the State of Oklahoma and the lessee, Price, expressed in the Act of June 16, 1906, and Oklahoma Constitution, Art. XI, Section 1, and in the Statutes of Oklahoma, Sess. Laws 1909, Chap. 28, Article II, page 448, accepted by Price as lessee.

“XI.

“The court erred in holding that the Statutes of Oklahoma cited in Assignment II, *supra*, as construed and applied in this case, to these defendants in error, did not take their liberty and property, and abridge their privileges as citizens of the United States, without due process of law, and in violation of the Constitution of the United States, Amendments V and XIV, and in holding that such legislation as construed and applied to these defendants in error does not take their liberty and property without compensation, and in violation of the Constitution of the United States and Amendments V and XIV thereto.

“XII.

“That the court erred in holding and deciding ‘that the only rights they (defendants in error) had * * * were no more than the preference right to re-lease said land for agricultural purposes.’ Because, and for the reason, that such holding con-

stitutes a deprivation of defendants' property, and an impairment of defendants' contract with the United States, and the State, and a denial of equal protection of the law to defendants in error, and the taking of property and liberty of defendants in error without due process of law, in contravention of the Constitution of the United States, and Amendments thereto.

“XIII.

“The court erred in holding that the Commissioners of the Land Office of Oklahoma ‘duly segregated such land in question from sale because of the oil and gas *supposed* to exist therein’ for the reason that such construction and application of the law impairs the contract of defendants in error, and deprives them of their property arbitrarily and without due process of law, and without compensation; for that by the law the defendants held preference right to buy said land and all of it, under and by virtue of the Act of Congress of June 16, 1906, and Constitution of Oklahoma, Art. XI, and the Statute of the State of Oklahoma of March 2, 1900, Sess. L., Ch. 28, Art. II, page 448, and held the preference right to lease and re-lease said land, and to the possession thereof and all of it, pending purchase, and for the reason and because the State of Oklahoma, by its legislation of March 2, 1909, had sold, or ordered sold said land on the terms in legislation expressed, and had caused the same to be appraised long prior to the purported Act of segregation; and the defendants, Price, had done and offered to do all things imposed upon them to do under the law, as found by the trial court to acquire the legal title thereto, and had acquired the equitable title as adjudged by the trial court, and such holding of the

court and application to these defendants constituted an impairment of defendants' contract; and deprivation of defendants' liberty and property; and a denial to defendants of equal protection of the law; all in contravention of the Constitution of the United States and Amendments thereto.

“XIV.

“The court erred in holding and deciding that the Commissioners ‘duly segregated such land in question from sale because of the oil and gas *supposed* to exist therein’ for the reason and because the Statute of Oklahoma, Sess. L. 1907-08, Chap. 49, Art. IV, page 490, and Statute of March 30, 1917, Sess. L. 1917, Chap. 253, page 462, or other law, did not confer plenary power, or authorize segregation of said land on ‘supposition,’ and did not authorize the arbitrary and whimsical discrimination practiced against defendants in error; and because the said statutes of Oklahoma did not provide for a hearing to determine whether or not the lands of defendants in error was mineral land or ‘supposed’ to contain mineral within the contemplation of said Statute; and because no notice of hearing on ‘segregation’ of said land was had; and because the law did not authorize the Commissioners of the Land Office of the State of Oklahoma to withhold the land of defendants in error from those ordered sold, or sold by the State by Statute of March 2, 1909, Sess. Laws 1909, p. 448, Chap. 28, Art. II (R. L. 1910, Ch. 69, Art. III), and the said holding and decision is applied to these defendants impaired the contract of defendants in error and deprived them of their liberty and property without due process of law, and without compensation, and denied to defendants in error the equal protection of the law, contrary to the

Constitution of the United States and the Amendments thereto, and makes said Statutes of 1907-08 and 1917 invalid.

“XV.

“The court erred in holding ‘the Commissioners of the Land Office could not have acted in good faith to the trust imposed in them by the Constitution and by the Statute, if they had advertised this land *believing* that it contains oil and gas products which would pay a hundredfold more to the State than the sale of land would pay,’ and by such decision, ruling and construction of the law as applied to these defendants in error, the rights of the defendants in error under the Constitution of the United States, and Act of Congress of June 16, 1906, is impaired, and their liberty and property taken without due process of law, contrary to the Constitution of the United States and the Amendments thereto, because and for the reason:

“(a) That the Commissioners of the Land Office of the State of Oklahoma had no *trust* imposed in them by the Act of Congress of June 16, 1906 (Enabling Act), insofar as this land and these defendants in error were concerned.

“(b) Their power was not made to depend upon their ‘believing’ something and to so construe and apply the law to these defendants in error, is to impair their contract right in and to said land, and to take their property without due process of law, and to deny them the equal protection of the law; all contrary to the Constitution of the United States and the Amendments thereto, and the Act of Congress of June 16, 1906 (Enabling Act of Oklahoma), and such construction makes said Statutes of 1907-08 and 1917 invalid.

“XVI.

“The court erred in holding: ‘But the State has not sold it and the lessee has not purchased it, and until the land is sold and purchased by the lessee and fee simple title conveyed to the lessee, such lessee has no right to the oil and gas and other minerals therein,’ for the reason that by such decision, construction and application of the State Statutes, the contract of defendants in error, relating to said land is impaired, and their liberty and property is taken without due process of law, and they are denied the equal protection of the law for the reason and because:

“(a) By Act of Congress of June 16, 1916 (Enabling Act), and by Sess. L. of Oklahoma 1909, p. 448, Ch. 69, Art. 1, Rev. L. 1910, the lessees were granted a preference right to purchase the land, and all of it, and its content and possession and such grant was accepted by the lessees, defendants in error, and is property and is protected by the Constitution of the United States, Article 1, Section 10, and the Fourteenth Amendment; and

“(b) Because the State of Oklahoma, by Act of March 2, 1909, page 448, Chap. 26, Art. II, sold, or ordered sold, said land to the lessee thereof; and granted preference rights in and to said land, and all of it, and all its content and possession under the terms in said Statute expressed; and the said grant by the said Legislature was by the said lessee accepted and he performed all on him imposed, and demanded conveyance; and, said decision by its construction and application of the law relating to said land impairs the contract between the lessees (defendants in error) and the United States of America, and the State of Oklahoma, in contravention of the

Constitution of the United States and the Amendments thereto, and deprives the lessees of their liberty and property and privileges and immunities under the law, in contravention of the Constitution of the United States and Amendments thereto.

“XVII.

“The court erred in holding that the ‘contract’ of the lessee of said lands, defendants in error, relating to said land and between said lessee and the United States of America, and the State of Oklahoma was, or could be, other than the state of the law governing said lands and applying to said lessee, common with all others similarly situated in said State, and as expressed in the Constitution of the United States and the Act of Congress of June 16, 1906 (Enabling Act), and the Constitution of the State of Oklahoma, accepting the conditions thereof and the legislation of the State of Oklahoma of March 2, 1909, aforesaid; and by such decision, judgment and order, and its application to said lands, and to defendants in error, the court impaired the contract existing between defendants in error and the State and the United States in relation to said land, and deprived defendants of their liberty and property without due process of law, and without compensation, and denied to defendants the equal protection of the law in contravention of and repugnant to the Constitution of the United States, Section 10, Article I, and Amendment XIV to the said Constitution.

“XVIII.

“The court erred in holding that the Statute of Oklahoma, Sess. Laws 1907-08, page 490 (Rev. Laws of Oklahoma of 1910, Chap. 69, Article III, p.

1938, and as amended March 30, 1917, Sess. Laws 1917, Chap. 253, page 462), was not in violation of and repugnant to the Constitution of the United States, Article I, Section 10, and the Fourteenth Amendment thereto, and did not impair the obligation of contract between the defendants below and the State of Oklahoma, and the United States of America, constituted by the Constitution of the United States and the Act of Congress of June 16, 1906 (Enabling Act), and the Constitution of the State of Oklahoma, Article XI; and the Acts of Oklahoma, Session Laws 1909, page 448 (Rev. Laws 1910, Chap. 69, Art. I, Sec. 1, *et seq.*, page 1923), accepted and acted upon by the defendants below, defendants in error here; and in holding that the said Statute of 1907-08 did not take defendants' property without due process of law, and did not deprive defendants of liberty and property without due process of law, and contrary to the Constitution of the United States and the Fourteenth Amendment thereto.

“XIX.

“The court erred in holding, deciding, decreeing and ordering that the defendants in error do not have and hold an equitable title, defensible in law, in and to the said land and did not own and hold an estate in fee therein by virtue of the status in law of said land, and said lessees thereof, and under the Act of Congress of June 16, 1906, and the Rules and Regulations referred to and incorporated therein, and the legislation of the State of Oklahoma thereunder and pursuant thereto, and not in not holding that the said estate was equivalent to and amounted to an estate in fee in said land without reversion, and subject only to the change in rate of annual pay-

ment by the lessee thereof; and the court by such decision, judgment and decree, and by the application thereof to these defendants in error, impaired the obligation of the contract of defendants in error, relating to said lands as expressed in the law aforesaid; and deprived defendants in error of liberty and property without due process of law and denied defendants in error the equal protection of the law, contrary to the Constitution of the United States and the Fourteenth Amendment thereto.

“XX.

“That said Statutes of Oklahoma, Sess. L. 1907-08, p. 490, and 1917, p. 462, Ch. 253, and the interpretation placed upon the legislation of the State of Oklahoma aforesaid, and the action of the Commissioners of the Land Office of the State of Oklahoma aforesaid, violates the trust reposed in the State by the Act of June 16, 1906, and diverts the said lands involved herein from the uses and purposes designated by Congress in the said Enabling Act and denies to the defendants in error (lessees of said land), their property and rights under the said Act of Congress of June 16, 1906, and is therefore void; because repugnant to the Constitution of the United States and Amendments thereto.

“XXI.

“The court erred in rendering and entering the judgment, order and decree herein rendered and entered.

“XXII.

“The court erred in denying defendants in error rehearing applied for, and in overruling defendants' in error motion and application for re-hearing.

“XXIII.

“The court erred in holding that the State of Oklahoma, or its Commissioners of the Land Office of Oklahoma, could, or did, regain the estate granted to the lessee by preventing him from performing the conditions subsequent fixed by the law of grant.

“Wherefore, these defendants, William T. Price and Ora Price, defendants in error in the Supreme Court of the State of Oklahoma, and petitioners in error in writ of error to the Supreme Court of the United States, pray that a writ of error from the Supreme Court of the United States may issue to the Supreme Court of the State of Oklahoma, and further pray that the Supreme Court of the United States will reverse the final order and judgment of the Supreme Court of the State of Oklahoma, and that the defendants, William T. Price and Ora Price, may be restored to all things which they have lost by occasion of said final order and judgment of the Supreme Court of the State of Oklahoma, and that they may have such further and other relief as may be proper and just; for all of which they invoke the protection of the Act of Congress of June 16, 1906, and the acceptance thereof in the Constitution of Oklahoma, and invoke the protection of the Constitution and Laws of the United States and Amendments thereto.

Respectfully submitted,

Blake & Boys,
Stuart, Sharp & Cruce,
W. C. Stevens,

Attorneys for Defendants in Error.

These assignments present the questions:

1. Was the preference right to re-lease under Rules of Secretary of Interior a property or vested right?

2. Was the preference right to re-lease reaffirmed by the legislature after statehood, Session Laws 1907-08, p —, a vested or property right.

3. Is the preference right to buy given the lessee, Price, by Section 10 of Enabling Act, 34 Stat. at L. 267, a property or vested right and a grant to him?

4. Does Section 10 of Enabling Act and Section 28 of Schedule of State Constitution, Section 1 of Article II of State Constitution, and Section 4 of Article II of State Constitution, create a contract by which the preference right to buy must be preserved for Price, and when authorized to be sold by legislature must be given him?

5. Does the sales Statute, Session Laws 1909, page 448, repeal the segregation statute of 1907-08 and give to Price the right to exercise his preference right, and is it mandatory on the Board to sell?

6. Can any subsequent legislation or action of the Board deprive Price of his rights so granted?

7. Have Price's rights guaranteed him by the Federal Constitution and the various Acts of Congress been violated?

8. Is the opinion of the Supreme Court of Oklahoma, record pages 170-186, correct in denying Price protection under the Enabling Act and the Federal Constitution?

These questions will be discussed in the order

and under the topics as shown in the index to this brief in order to avoid repetition.

ARGUMENT.

Legislation Respecting Lands Involved Prior to Statehood.

Section 36 of the Act of March 3, 1891, 26 Stat. L. 1043, provides:

“Section 36. That the school lands reserved in the Territory of Oklahoma by this and former acts of Congress, may be leased for a period not exceeding three years for the benefit of the school fund of said territory by the Governor thereof under regulations to be prescribed by the Secretary of the Interior.”

Pursuant to this Act of Congress, the Honorable George W. Steele, then Governor of the Territory of Oklahoma, on March 19, 1891, took up with the Secretary of the Interior the matter of Rules and Regulations to be adopted. Pursuant to the correspondence then had the Acting Commissioner on March 19, 1921, promulgated Rules, which were approved by the Honorable George Chandler, Secretary of the Interior, on March 20, 1891, certified copy of which appears Record pages 129 to 136, inclusive.

A reading of these letters and Rules gives

one a good idea of the conditions at that time and the motive, which prompted the Governor and Secretary of the Interior in adopting Rules that would protect and encourage any *bona fide* settler. The particular Rule I desire to call your attention to appears on page 134, and is as follows:

“In case a new lease is to be made at the end of the three years the preference shall be given the former lessee, if the Governor finds that he cultivated the land in a business like manner, and fulfilled the term of the lease in good faith.”

It is a matter of history in the State that from the time of the adoption of these Rules, during all of the time until the passage by the Legislature after statehood of the Sale Act, that the question of the disposition of the School Lands was prominent in the minds of the people of the State as well as the officers having charge thereof. At the time of statehood it was a political issue and prominently discussed in various campaigns as to whether the lessee should be given preference right to buy and as to whether the State should sell the leases when granted to them. The result of these discussions is reflected in the Enabling Act and the Constitution of the State as well as the immediate passage after statehood of the Sale Statute.

Following the adoption of these Rules and Regulations, the Act of May 4, 1894, Vol. 28, Stat. L., p. 71, ratified the President's Proclamation reserving Section 33 for Public Building. By this same act, the Rules and Regulations heretofore quoted were ratified and adopted by Congress. This act reads as follows:

“Be it Enacted By the Senate and House of Representatives of the United States of America in Congress Assembled: That the reservation for university, agricultural college, and normal school purposes, of section thirteen in each township, of the lands known as the Cherokee Outlet, the Tonkawa Indian Reservation, and the Pawnee Indian Reservation in the Territory of Oklahoma, not otherwise reserved or disposed of, and the reservation for public buildings of section thirty-three in each township of said lands not otherwise disposed of, made by the President of the United States in his proclamation of August nineteenth, eighteen hundred and ninety-three, be, and the same are hereby ratified, and all of said lands and all of the school lands in said territory may be leased under such laws and regulations as may be hereafter prescribed by the legislature of said Territory; but until such legislative action the governor, Secretary of the Territory and superintendent of public instruction, shall constitute a board for the leasing of said lands under the rules and regulations heretofore prescribed by the Secretary of the Interior, for the respective purposes for which the said reser-

uations were made, except that it shall not be necessary to submit said leases to the Secretary of the Interior for his approval; and all necessary expenses and costs incurred in the leasing, management, and protection of said lands and leases may be paid out of the proceeds derived from such leases."

The lands involved are located in what was known as the Kiowa and Comanche country, and said lands were not open to settlement until 1901. However, by the Act of Congress of June 6th, 1900, 31 Stat. L., page 680, the Kiowa and Comanche country was opened to settlement and section 33, together with other lands located in the Kiowa and Comanche country, were reserved for public buildings to the Territory of Oklahoma, and future State of Oklahoma, in the following language:

"That sections sixteen and thirty-six, thirteen and thirty-three of the lands hereby acquired in each township, shall not be subject to entry, but shall be reserved, sections sixteen and thirty-six for the use of the common school and sections thirteen and thirty-three for university, thirty-six for the use of the common schools and public buildings of the territory and future State of Oklahoma; and in case either of said sections or parts thereof, is lost to said territory by reason of allotment under this act or otherwise, the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss."

The next legislation of Congress was the Act approved June 16, 1906; 34 Stat. L. 267. It is commonly called the Enabling Act. Sections 8, 9 and 10 of the Enabling Act are the sections covering the lands granted by Congress for school and public building purposes:

Section 8 is as follows:

“UNIVERSITY, ETC., GRANTS—ALLOTMENTS—
USE OF LANDS AND PROCEEDS—LANDS FOR PUBLIC INSTITUTIONS AND BUILDINGS—MINERAL AND OIL LANDS. That section *thirteen* in the *Cherokee Outlet*, the *Tonkawa Indian Reservation* and the *Pawnee Indian Reservation* reserved by the *President* of the United States by *Proclamation* issued *August nineteenth, eighteen hundred and ninety-three* opening to settlement the lands, and by any *Act* or *Acts of Congress* since said date and section *thirteen* in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said State for the use and benefit of the University of Oklahoma and the University Preparatory School, one-third; of the *normal schools* now established or hereafter to be established; *one-third*; and of the *Agricultural and Mechanical College* and the *Colored Agricultural Normal University*, one-third. The said lands of the proceeds thereof as above apportioned shall be divided between the institutions as the Legislature of said State may prescribe: Provided, That the said lands so reserved or the proceeds of the sale thereof

shall be safely kept or invested and held by the said State and the income thereof, interest, rentals or otherwise, only shall be used exclusively for the benefit of said educational institutions. Such educational institutions shall remain under the exclusive control of said State and no part of the proceeds arising from the *sale or disposal* of any lands herein granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college or university.

“That section thirty-three, and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation, and Acts for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the Legislature of said State may prescribe.

“Where any part of the lands granted by this Act to the State of Oklahoma *are valuable for minerals*, gas and oil, such lands shall not be sold by the said State prior to January first, nineteen hundred and fifteen; but the same may be leased for periods not exceeding *five years* by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require and the advertisement shall specify in each case a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which that shall properly belong,

and no transfer or assignment of any lease shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: Provided, however, that agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest thereon by reason of such mining operations. The Legislature of the State may prescribe additional legislation governing such leases not in conflict herewith."

Section 9 is as follows:

"DISPOSAL OF COMMON SCHOOL LANDS—SCHOOL FUND FROM PROCEEDS—LEASE, ETC. That said sections *sixteen and thirty-six* and lands taken in lieu thereof, herein granted for the support of the common schools, if sold, may be appraised and sold at public sale in one hundred and sixty acre tracts or less, *under such rules and regulations as the Legislature of the said State may prescribe, preference right to purchase at the highest bid* being given to the lessee at the time of such sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of such schools. But said lands may, under such regulations as the Legislature may prescribe, be leased for periods not to exceed ten years; and such lands shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Section 10 is as follows:

“UNIVERSITY AND PUBLIC INSTITUTION LANDS
SALES OR LEASES—APPRAISAL OF IMPROVEMENTS
—PAYMENT BY PURCHASER. That said sections
thirteen and thirty-three aforesaid, if sold, may
be appraised and sold at public sale in one hun-
dred and sixty acre tracts or less, *under such*
rules and regulations as the Legislature of said
State may prescribe, preference right to pur-
chase at the highest bid being given to the les-
see at the time of such sale, but such lands may
be leased for periods of not more than five
years under such rules and regulations as the
Legislature shall prescribe, and until such time
as the Legislature shall prescribe such rules
these and all other lands granted to the State
shall be leased under existing rules and regula-
tions, and shall not be subject to homestead en-
try or any other entry under the land laws of the
United States, whether surveyed or unsur-
veyed, but shall be reserved for designated pur-
poses only, and until such time as the Legisla-
ture shall prescribe as aforesaid *such lands*
shall be leased under the existing rules: Pro-
vided, That before any of said land shall be
sold as provided in sections nine and ten of this
Act, the said lands and improvements thereon
shall be appraised by three disinterested ap-
praisers, who shall be non-residents of the
county wherein the land is situated, *to be desig-*
nated as the Legislature of said State shall pre-
scribe, and the said appraisers shall make a
true appraisement of said lands at the actual
cash value thereof, exclusive of improvements,
and shall separately appraise all permanent im-
provements thereof at their fair and reasonable

value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall, *under such rules and regulations as the Legislature may prescribe*, pay to or for the leaseholder the appraised value of said improvements and to the State the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract at less than the appraisalment thereof shall be accepted."

Section 12 of the Enabling Act is a grant of land in lieu of a grant of land for purposes of internal improvements made to new States under Section 8 of the Act of September fourth, 1841, and grants to the State for certain specified schools several hundred thousand acres of land which are commonly spoken of as new college lands. It should be noted here that the preference right to purchase at the highest bid given the lessee does not apply to the new college lands, for the very obvious reason that these new college lands had never been leased as this was the initial legislation, but does apply to sections sixteen and thirty-six and thirteen and thirty-three, without regard to their character or mineral content, and in recognition of lessees rights.

Section 22 of the Enabling Act provides:

"That the constitutional convention provi-

ded for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act.”

By Section 28 of the schedule to the State Constitution the State did accept the terms of the Enabling Act in the following language:

“The terms and provisions of an act, etc. (Enabling Act) are hereby accepted. * * *

Section 1 of Article 11 of the State Constitution also accepted the grants of the land in the following language:

“The State hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act and any other acts of Congress for the *uses and purposes and upon the conditions, and under the limitations for which the same are granted and donated*, and the faith of the State is hereby pledged to preserve such lands and moneys, and all moneys derived from the sale of any of such said lands, as a sacred trust, and to keep the same for the uses and purposes for which they were granted and designated.”

Section 4 of Article 11 of the Constitution authorizes the sale of all public lands granted by Congress in the following language:

“All public lands set apart to the State by Congress for charitable, penal, educational and public building purposes, and all lands taken in lieu thereof, may be sold by the State *under*

such rules and regulations as the legislature may prescribe in conformity with the regulations of the Enabling Act."

By this legislation upon the part of Congress and the acceptance of the terms of the Enabling Act by the people of the State of Oklahoma through the adoption of their Constitution, the rights of the government, the rights of the State, and the rights of the "lessee" on the public land, and the authority and the duty of the State is fixed according to the terms, provisions, conditions, and limitations of this legislation of Congress.

We desire to impress on the Court that prior to the passage of the Oklahoma Enabling Act, Congress had never passed an Enabling Act effecting the public lands in any other state in the Union wherein the preference right to re-lease, and to purchase at sale was given the lessee. Consequently, in all other grants to other States the lessee had by law at the time of purchase no especial rights or preference; therefore any authority based upon the right of the State, or the title of the State, to such lands under other Enabling Acts does not apply in the case at bar. The compact between the government and the State fixes the lessee's right and limits

what the State can do, while in other States the lessee had no such rights in the lands as they have under the Acts of Congress relating to Oklahoma.

Legislation By the State Since Statehood.

We have heretofore dealt with the legislation of Congress prior to statehood and with the provisions of the Constitution. We will now turn to the legislation of the State concerning the land involved since statehood.

We first desire to call the Court's attention to the Act of February 8, 1908, appearing in the Session Laws of 1907-1908, at page 484, Section 1 of the act provides for the extension of the leases then on the land until January 1, 1909, which, of course, is a recognition by the State of the rights of the lessees then on the lands. Section 2 reads as follows:

“It shall be the duty of the Commissioners of the Land Office to cause an appraisalment to be made as soon as practicable of all lands granted to the State for educational and public building purposes. Said appraisalment to contain a complete description of said land, showing the number of acres in cultivation on each quarter section, the amount of cotton, corn and other farm products raised on said land for the year nineteen hundred seven and nineteen hundred eight, the actual cash value of said land with the improvements thereon, the value of

the improvements, giving a description and kind of said improvements, the cash value of the same, the number of years said improvements have been on said land, the name of the lessee occupying same, and if the land leased is not occupied by the lessee, and the same has not been subleased by the lessee, give the price for which said sublessee pays per acre. Said appraisement to contain a list of all land suitable for townsite purposes, and state whether or not any of said land is now being used for townsite purposes, and if so, the kind and character of buildings thereon, said appraisement to contain a complete geographical and statistical report by counties and such additional information as may be required by the Commissioners of the Land Office. Provided, the appraisers shall not be appointed from the county in which the land to be appraised is located or from any county adjoining the county in which the land is to be appraised is located; and provided further, that no one who has any interest or claim in any of the school lands shall be appointed as such appraiser."

Section 3 reads as follows:

"It shall be the duty of the Commissioners of the Land Office to make a detailed and summarized report of all the statistics obtained under the provisions of this Act, to the next Legislature, on or before the fifth legislative day thereof."

The same Legislature passed another Act under date of May 26th, 1908, appearing in Session

Laws of 1907-1908, page 486. The first section of it reads as follows:

“When any tract of land belonging to the State is, by the Commissioners of the Land Office, *known to be mineral in character*, the Commissioners of the Land Office shall enter of record, in their office, their findings, declaring that such mineral character does exist, and further declaring the minerals thereof segregated from the surface uses and interests therein, and all such mineral interests shall be reserved for sale until the year 1915, and for such additional period of time as may be determined by law.”

It is thereby observed that the lands to be segregated under this act were the ones known to be mineral in their character and the Legislature also complied with the provision of the Enabling Act which prohibited the sale of mineral lands until the year 1915. The remaining parts of the acts have to do with the prospecting of the public lands and of legislation concerning the development of public lands under mining laws. These, of course, are not involved in this case, for the reason that no development under the mining laws has ever been made upon the lands in controversy. However, Section 21, appearing at page 489, provides that “all preference rights, vested rights and equities shall be inherent rights.”

The same Legislature passed the Act approved May 26th, 1908, appearing at page 490 of the Session Laws of 1907-08. By this Act it is provided by Section 1 as follows:

“When any tract of the school and other public lands, granted to the State of Oklahoma under the Act of Congress known as the ‘Enabling Act’ is by the Commissioners of the Land Office of the State, known to contain oil or gas, or where such lands are, by said Commissioners, deemed valuable for oil and gas purposes, such Commissioners shall enter of record in their office, their finding, declaring that such oil or gas character exists, and further declaring that the oil and the gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act.”

It is to be noted that both Acts fail to provide for any notice to the then lessee of the lands of such proposed segregation of lands “known to contain oil and gas” or “deemed valuable for oil and gas purposes,” and they attempt, in this section, to withhold the land from sale, lease or other alienation except as provided in this act. This provision, of course, could not be binding upon any subsequent legislature and was effectively repealed by the laws of 1909 as we will hereinafter show.

Section 3 of this Act provides for the leasing of the lands:

“FIRST: For a period not exceeding five years, with suitable provisions for preference right to re-lease for a second terms of five years at its expiration, at the maximum rate of rentals, royalties and bonuses that may be obtained therefor, at the time of such renewal.

“SECOND: Provision for advertisement.

“THIRD: Provides for public bids and the rejection of any and all bids.

“FOURTH: Provides for fixed royalty of not less than twelve and one-half per cent.”

Section 5 reads as follows:

“No lease shall be executed to, or in the interest of any pipe line or transportation company, or and company allied to, or confederated therewith, or any subsidiary company thereof, nor any other company, corporation, person or association under the control of either or all of them, nor to any stockholder, officer, director, agent, representative or employe, acting singly or as firms, or corporations of such company, or either of them. Leases executed under the terms of this Act shall stipulate that, for any refinery of crude oils and its products and by-products, owned, operated or controlled by the State, the State shall have the preference right to purchase and receive the output of such oil and gas lease at the market price thereof. Provided, nothing in this Act shall prevent the lessee from selling the output of said leases to any person, firm or cor-

poration whatsoever until notice in writing from the Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas, or either of them, and all sales of oil and gas under this proviso shall be valid and binding."

Section 6 provides for the payment of damages to the surface only, occasioned by the oil and gas lessee.

Section 7 provides for condemnation in case of failure to agree. This is the first piece of legislation that has come to our notice that permits the taking of private property for private uses. In other words, the Legislature has here acknowledged an interest or ownership in the lessee to the lands covered by the lease and yet they say that another lessee may come along and condemn his lease. That is certainly violative of the Constitution prohibiting such taking—both of the State and United States. This is the first time that any reference has been made to a surface lessee by any legislation. Perhaps the Legislature only meant to use the words "surface" as descriptive of the lessee and not with the intention of saying the prior lessee had only a surface interest.

Pursuant to the Act appearing pages 484-485,

Session Laws of 1907-08, the Commissioners of the Land Office made the report to the Legislature which met in 1909 as required by Section 3. An examination of the Journal of that session shows the time was extended a few days in order that the Commissioners might get their report completed to the Legislature. It is perhaps quite significant in view of this legislation in 1907-08 to call attention to some of the special messages by Governor Haskell to this Legislature.

On December 2, 1907, he said:

"I recommend immediate legislation for the sale of school lands according to the grant under which said land was obtained by the State and the provisions of the Constitution."—Senate Journal, page 8, Governor's Messages.

On March 30th, 1908, he again, in a special message, said:

"The Constitution empowers the Legislature to provide for the sale of school lands under such regulations and conditions as shall deal justly with the rights of the lessees who, by their efforts have added to the value of such property and also mindful of the rights of the State and its people at general. These lessees have a right to know what the future has in store for them and I trust that before this session closes you will have passed upon that question in such a way as to deal justly with the interest of the public and the lessees."—Senate Journal, 1909, page 36, Governor's Messages.

Again, on May 4th, 1908, the Governor said in his special message:

"As I view the matter, it would be an act of bad faith to neglect action upon the question of the sale of the school lands and one that would lead to an appeal to the people for a law without consideration of the legislative department."—Senate Journal, page 49 of Governor's Messages.

Pursuant to these messages, the appraisement of the lands was authorized by the Legislature of 1907-08, and in compliance with the requirements of the Enabling Act, relative to such an appraisement.

The Legislature of 1909 passed an Act approved March 22, 1909, appearing Session Laws 1909, page 440, providing for the manner and procedure of leasing the public lands of the State.

Section 2 provides that sections sixteen and thirty-six, reserved for common schools, shall be leased for periods of ten years and that the present lessee, including those having right to re-lease, east of ranges thirteen and fourteen, shall only be permitted to lease 160 acres, while west of said ranges 640 acres.

Section 3 provides that all lands reserved for

universities, agricultural colleges, etc., shall be leased for a period of five years.

Section 4 reads as follows:

“All lands reserved, the proceeds of which are to be used in the construction of penal, charitable and public buildings, and all indemnity land of whatsoever character, and all lands granted to the State of Oklahoma under and by virtue of section 12 of the Enabling Act admitting Oklahoma to statehood, until the same shall be sold as by law provided, shall be leased by the Commissioners of the Land Office under such rules and regulations as they may prescribe; provided, that no preference right to purchase or release shall be granted on lands secured under and by virtue of section 12 of the Enabling Act admitting Oklahoma to statehood.”

It will be noted that by this section the Legislature kept in mind that the lessee had a preference right to buy and indicated that they expected to sell and also provided, as the Enabling Act did, that there was no preference right on the new college lands granted by virtue of Section 12 of the Enabling Act.

Section 6 provides for the leasing of vacant lands.

The same Legislature passed an Act approved

March 2, 1909, Session Laws 1909, page 448, providing for the sale of section thirty-three and all lien or indemnity land.

Section 1 of the Act reads as follows:

“The Commissioners of the Land Office shall dispose of, sell and convey, subject to such limitations, exceptions, conditions, rules, regulations and instructions, as provided in the Enabling Act, in this act, or any act amendatory thereof, except where same is embraced in any reservation specifically reserved for sale in this act or any act of Congress or any act of the State specially reserving any part thereof, for any special purpose, all of the following enumerated and described school and public lands of this State:

“All lands owned by this state, reserved, granted, and taken in lieu of sections numbered sixteen (16), thirty-six (36), thirteen (13) and thirty-three (33), and known as Indemnity Lands: Provided, that when such lands or any part thereof are sold and conveyed, the proceeds derived therefrom shall be prorated among the several funds as their interest may appear, and used as provided by law; also all lands embraced in sections numbered thirty-three (33) in that part of the state formerly known as Oklahoma Territory, and granted to the state for charitable and penal institutions and public buildings: Provided, that all the money derived from the sale of any or all of said lands, shall be apportioned and disposed of as may be provided by law; also all lands granted to this state by the United States under and by virtue of section 12 of the Enabling

Act for the following purposes, namely: For the benefit of the Oklahoma University two hundred and fifty thousand acres; for the benefit of the Agricultural and Mechanical College, two hundred and fifty thousand acres; for the benefit of the University Preparatory School, one hundred and fifty thousand acres; for the benefit of the Colored Agricultural and Normal University, one hundred thousand acres; and for the benefit of the normal schools now established or hereafter to be established, three hundred thousand acres: Provided, that all money derived from the sale of any of said lands shall be invested for said *state in trust*, and interest thereon shall be used exclusively and as shown above proportioned in the support and maintenance of said school: Provided, that if any tract, part or parcel of any of the land enumerated and described in this section, was or shall be returned to the Commissioners of the Land Office by a board of appraisers thereof, including those tracts of land embraced in sections numbered thirteen (13), sixteen (16), and thirty-six (36), and otherwise herein reserved for sale, that are now platted and occupied and leased directly from the State or Territory of Oklahoma for townsite purposes, as being more valuable for townsite than for agricultural purposes, then such tract, part or parcel of such land shall be by said Commissioners of the Land Office reserved from sale and disposed of under the terms of this bill: Provided, further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915."

Subdivision (b) of Section 3, appearing at page 451, reads as follows:

“Any lessee holding a lease on any of the lands described in section 1, of this act, except New College lands, shall have the preference right to purchase 160 acres so leased, at the highest bid at the time of sale of the same as hereinafter provided in this bill. * * *,”

The remainder of the section being proviso concerning New College lands and other lands not similar to the lands in controversy.

Section 4 reads as follows:

“Said lands and improvements thereon shall be sold under the appraisement of the year 1908, made and returned to the Commissioners of the Land Office. Provided, that in the event it shall appear the said land or improvements have not been properly appraised, the Commissioners of the Land Office shall have the power to order and provide for new appraisement: Provided, further, the Commissioners of the Land Office shall notify the lessee before such land is offered for sale of the appraised value of his improvements, and should any such lessee be dissatisfied with the appraised value of his improvements, said lessee shall within thirty days from notice thereof notify the Commissioners of the Land Office in writing; whereupon the land covered by said lessee's contract shall be reserved from sale, pending a review of the appraisement made by the said Commissioners of the Land Office in the district court

of the county in which said land is located. An appeal from the Board of Appraisers may be taken as provided in 'An Act Amending Section 28 of Article 9, Chapter 17 of the Statutes of Oklahoma, 1893, and Regulating the Method of Procedure in the Condemnation of Private Property for Both Public and Private Uses,' approved May 20, 1908; and the procedure of such appeal and the review and demand for jury trial in said court shall conform to the procedure therein set forth; and pending the termination of said appeal the lessee shall be entitled to remain in possession of said property, paying therefor as rental five percentum of the appraised value of said land upon which said improvements are located: Provided, however, in addition to that which is herein stipulated, there shall nowhere be a meaning of any or all of the provisions or of the sections of this act, collectively or severally, so construed as to extend to any lessee the preference right of purchase to any of the lands withdrawn from homestead entry and granted to the State under any by virtue of Section 12 of the Enabling Act."

Section 15 reads as follows:

"All the lands now leased, described and enumerated in Section 1 of this Act, shall be opened for sale immediately upon the appraisalment of the same as provided in this Act and by law, and all of said lands offered for sale under the provisions of this Act that are leased shall be sold upon the expiration of each lease contract, or sooner upon petition of lessee to the Commissioners of the Land Office, asking for sale of any of said lands so leased."

Section 17 reads as follows:

“Any willful violation of this Act by any member of the Commissioners of the Land Office or by any member of the Board of Appraisers or by any other officer or agent selected to perform any of the duties required under this Act shall constitute a felony, and, upon conviction, he shall be punished by imprisonment in the penitentiary for not less than three years, nor more than ten years, and shall be summarily removed from office and forever disqualified from holding any office of honor, trust or profit under the Constitution and laws of this State.”

Section 18 reads as follows:

“All Acts and parts of Acts in conflict herewith are hereby repealed.”

This is the Act that is in force to this date authorizing the sale of the lands involved in this case. It is to be noted that Section 1 provides for the sale of all kinds and character of lands including town-site and mineral lands. The last proviso of Section 1 reads:

“Provided, further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915.”

This Act is a definite authority to sell, not only lands agricultural in character, but lands known to

be mineral. The lands in controversy were not known to be mineral at the time of the passage of this Act, and they were not known to be mineral until about the time, and shortly after the commencement of this action in 1920.

Preference Right Vested at Time of Grant.

Counsel for defendant in error have heretofore and I assume will here, contend that the last part of Section 8 of the Enabling Act, quoted, *supra*, applies to the lands involved. A reading, however, of the section will disclose that it is, first, the grant of the lands, and, second, it uses the word *where* any part of the lands granted by this Act to the State of Oklahoma *are valuable for minerals*. The word *where* denotes place and the word *are* the present tense. If Congress had in mind to permit this part of the section to be applied to after discovery of minerals, it would have used the expression *are* or might hereafter *become*.

2. The last part of the section provides for lease for only five year periods.

3. It provides that the agricultural lessees in possession of such lands shall be reimbursed by the mining lessee for all damages thereon by reason of

such mining operations. Under this section Congress certainly did not intend to say that leases of this kind could be made upon lands discovered to be mineral some fifteen years afterwards, neither did they intend to say that a lease for five years or as long thereafter as oil and gas should be found should be executed. There would, of course, be some damage to the lessee in possession as a result of the five year operation under an oil and gas lease. The complete answer to my mind to their contention is that the preference right was not destroyed by this provision, nor excepted from the general clause giving the preference right in Section 10 of the same Act. The character and extent of the damage suffered to the lessee in possession under the five year lease would be very different from the damage suffered under a perpetual lease.

We believe that this section only applies to those lands then known to be mineral, that is, at the time of the grant, and that if the State should see fit to lease them for the five year period, they then had the right to sell them after January 1, 1915, and that the original *lessee in possession* had the preference right then to buy mineral and all. If any other construction is to be put upon this section, it

means that the title under the preference right must be held in abeyance and not vested in any particular person until the time when all persons who might desire to speculate upon the mineral character of the land might have abandoned their quest for oil and gas on the particular tracts.

Could it be said that the preference right to buy the land and all of it, including the mineral, was first in Price, then perhaps ten years afterwards by reason of some local oil flurry, a lease could be sold on the lands and during that time he should not have the preference rights, then when the flurry was over and no leases could be sold that it was returned again to Price and so on indefinitely?

The case of *Colorado Coal & Iron Company v. United States*, 123 U. S. 307, 31 L. ed. 182, is a case brought by the United States against the Colorado Coal & Iron Company to cancel certain patents, alleging fraud in obtaining the patents. The Colorado Coal & Iron Company being an innocent purchaser from the patentee under the pre-emption act. The pre-emption act provided the land should not be open to pre-emption where there was located "*known minerals.*" The court says in paragraphs 6 and 1 of the syllabus as follows:

“6. It is not sufficient to constitute ‘known mines’ of coal, within the meaning of the statute, that there should be merely indications of coal beds or coal fields, of greater or less extent and value, as shown by outcroppings. To constitute the exemption contemplated by the pre-emption act under the head of ‘known mines,’ there should be, upon the land, ascertained coal deposits of such extent and value as to make the land more valuable as a coal mine than for agricultural purposes.

“7. New discoveries, after the sale by which the land becomes profitable to work as a mine, cannot affect the title as it passed at the time of the sale.”

At the last of the opinion, the Court says as follows:

“A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual ‘known mines’ capable of being profitably worked for their product so as to make the land more valuable for mining than for agriculture, a title to them acquired under the Pre-emption Act cannot be successfully assailed.”

Case of *U. S. v. Iron Silver Mining Company*,
128 U. S. 673, 32 L. ed. 571, is an action by the

United States to cancel certain patents issued under the placer mining law, alleging that they were obtained by fraud in that at the time of the application the lands were not placer mining ground, but contained veins and lodes of quartz and other rock bearing gold, silver and other metals. The question in the case was whether the determination of the character of the land could be determined as of the time of the issuance of the patent. Patents were issued under Section 2329 of the Revised Statutes, which provides:

“Claims usually called ‘placers,’ including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent. * * *”

The patent itself contained the following provision:

“FIRST: That the grant is restricted in its exterior limits to the boundaries of the tract described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits which may hereafter be discovered within said limits, and which are not claimed or known to exist at the date thereof.

“SECOND: That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist

within the described premises, at the date thereof, the same is expressly excepted and excluded therefrom.”

The statute excluded from the placer mining laws such veins and lodes “claimed or known to exist” at the time of the application.

Section 8 of syllabus:

“It is not enough that there may have been some indications by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as ‘known’ veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account and justify their exploration.”

Section 9 of syllabus:

“The subsequent discovery of lodes upon the ground and their successful working does not affect the gold faith of the application. That must be determined by what was known to exist at the time.”

In the case of *Shaw v. Kellogg*, 170 U. S. 312, 42 L. ed. 1050, the question arose as to when the mineral character of the land was to be determined under a grant from Congress. By Section 6 of the Act making the grant, as quoted in the opinion, it is provided:

“Section 6. And be it further enacted, that

it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, *not mineral*, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. * * *

Pursuant to this section, and other sections of the act, the heirs located their lands and filed their plats with the Land Department of the United States as provided by the Act, which were received and in some respects recognized, but no final approval and no patent was ever issued to the lands by the Land Department. Subsequently, mineral was found on one of the tracts. Action in ejectment was brought to recover possession of the land on which mineral was discovered. The opinion is by Justice Brewer and he states the contentions in the case as follows:

“These contentions are that Congress granted only non-mineral lands; that this particular tract is mineral land and therefore by the terms of the act is not within the grant. That no patent has ever been issued, and therefore the legal title has never passed from the Government. That the Land Department never adjudicated that this was non-mineral land, but on the contrary, simply approved the location, subject to the conditions and provisions of the

act of Congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries or minerals within the tract."

The Court held (syllabus 1):

"The act of June 21, 1860, authorizing the heirs of Luis Maria Baca to select lands in the territory of New Mexico, instead of land claimed by them under the Mexican grant, with the approved survey and location therein required, made a full transfer of the title to them, having all the efficacy of a patent."

The approval of the plat in this case by the Surveyor General as was provided by the Act, stated it was "subject to the conditions and provisions of paragraph 6." The contention was made that this held the question of the mineral character of the land in abeyance until it should be finally determined by the Land Department as to whether it was mineral.

In passing on this question, the Court held (syllabus 2):

"The limitation of the approval entered upon the plat by the surveyor general under the direction of the Land Department, that it was 'subject to the conditions and provisions of paragraph 6' of said act, was a limitation beyond the power of executive officers to impose, and did not make the title conditional."

The latest declaration by the Supreme Court of the United States as to when the grant takes effect, is the case of *Wyoming v. United States*, 255 U. S. 489, Vol. 65, Law, Edition, p. 453, when published. Congress granted to the State of Wyoming certain school lands, same being sections sixteen and thirty-six in each township. By the Act of February 28, 1891, 26 Stat. L. 796, the State was invited and entitled, in the event any of the designated land in place as passed under the school grant should be included within a public reservation, to waive its right thereto and select in lieu thereof other lands or equal acreage, unappropriated, *non-mineral* public lands outside the reservation and within the State. The State under this Act waived its right to certain lands included in said reservations and filed its plats of selection of the lieu lands. After the filing of the plats, mineral was discovered on the tract involved, which was a part of the lieu lands selected. The court, in discussing this point, and in discussing the power of the officers of the Land Office to accept or reject under the act, says:

“In principle it is plain that the validity of the selection should be determined as of the time when it was made; that is, according to the conditions then existing. The proposal for the

exchange of land without for land within the reserve came from Congress. Acceptance rested with the state, and, of course, would be influenced and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the state which the land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the state's waiver and selection met the requirements of the congressional proposal, and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the state, but of determining whether an existing privilege conferred by Congress had been lawfully exercised,—in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the state in 1912. If these were valid then,—if they met all the requirements of the congressional proposal, including the directions given by the secretary,—they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal, and full compliance therewith, confer vested rights which all must respect. Equity then regards the state as the owner of the selected tract, and the United States as owning the other; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions, whether one tract or the other be affected."

It cannot be denied that originally Congress had the disposition of these public lands. When it

relieved itself of this title, it went somewhere—both the legal and equitable title. It saw fit to grant the equitable title to the lessee and to the State the legal title, and to require of the State as the trustee between the government and the beneficiaries under the act, which in case at bar was the lessees, to do and perform certain things and to protect certain granted rights of the lessee. Clearly, if the naked legal title vested in the State the vested rights of the lessee were permanent. He had at that time, under the law in force, the preference right to release the land. Upon the passage of the Enabling Act, he had the preference right to buy, so that when the State of Oklahoma started to legislate, and the officers of the State started to operate under the laws of Congress and the laws of the State, they were charged with the execution of the agreement between the Government and the State.

In the Wyoming case, *supra*, the President attempted to withdraw the land in controversy as possible oil lands after it had been selected by the State, and the General Land Office attempted to reject and disapprove the selection of the State, and the Court in the syllabus states the law as follows:

“A state, having accepted the proposal of

Congress that, if any designated sections of public land passing under the school land grant in the state, should be included within a public reservation, it might waive its right to them, and select instead other vacant, unappropriated, non-mineral public land of equal acreage, under the direction of the Secretary of the Interior, and having complied with the terms of proposal, became invested with the equitable title to the selected land, and the Secretary of the Interior and the Commissioner of the General Land Office could not disapprove and reject such selection on the ground that the selected land was, two years later, included in a temporary executive withdrawal as possible oil land, under the Act of June 25, 1910, and still later was discovered to be mineral land; that is, to be valuable for oil. The validity of the selection must be determined according to the conditions as of the time when the waiver and selection were made."

In the case at bar, the school land lessee had selected his land when he executed his first lease. He had complied with all the provisions of law and was entitled to the benefit of the provisions of the law. As will be shown later in this brief, the State authorized and directed the Commissioners of the Land Office to sell the land in controversy. The officers of the State have failed and neglected to sell. In fact, they have attempted, as the Land Office did in the Wyoming case, to exclude the land from sale and divert it to dismemberment and exploita-

tion on shares. This they cannot do without violating the rights of the defendants.

Every case that we have been able to find holds that when a grant is made, that the character of the land must be determined as of the time of the grant. There is some difference in the cases as to when the grant is made, as under the Pre-emption case cited *supra*, the grant is not made until pre-emptioner is entitled to a patent, while under a grant, such as the case at bar and such as was in the case of *Shaw v. Kellogg*, *supra*, the character of the land is determined as of the date of the grant. The courts, from time immemorial have said that title to lands must be fixed and vested in somebody at all times, not held in abeyance, and if the construction we contend for cannot be placed upon the Enabling Act, then the title to the mineral lands or the title to the mineral rights in the land is flitting back and forth from time to time as speculators might believe or not believe the land to be mineral, or as actual operators might believe or not believe the land to be mineral, or as they might finally discover it to be mineral, or not mineral. While if the construction we contend for is placed upon the Enabling Act, the rights of every lessee, the rights of the State, are

definitely and certainly ascertainable, because they are all to be determined as of the date of the grant.

Other cases hold that the subsequent discovery of oil and gas made after rights to land have become fixed in settler or occupant cannot affect his right so attached prior to its discovery. In addition to the authorities heretofore cited on this proposition, are the following:

Diffenback v. Hawk, 115 U. S. 393, 29 L. ed. 423.

Davis v. Wiebold, 139 U. S. 507, 35 L. ed. 238.

Douer v. Richards, 151 U. S. 658, 38 L. ed. 305.

Saunders v. La Purisima Gold Mining Co., 57 Pac. (Calif.) 656.

We also desire to call the Court's attention to the case of *Green v. Robinson*, 210 S. W. (Texas) 498, and in the consideration of this case, we again call the Court's attention to the fact that Texas school lands were never owned by the government, but were owned by the state, so that a grant of the school lands under the Texas laws is the same as the grant by the United States to the state of the public lands in Oklahoma. In the one case the State of Texas was the original owner and in the other case the United States was the original owner. The

opinion is by Chief Justice Phillips and holds that where a purchaser from the state under act of April 12, 1883, of school land, not known to contain minerals, but fairly and in good faith classified and sold without reservation as agricultural land by the duly authorized state officers, he acquired title to minerals which might be thereafter discovered, and that the relator therein was not under the acts of the Thirty-third Legislature as amended in extraordinary session of such legislature, entitled to a permit to prospect on the land for oil and gas. The opinion of Mr. Chief Justice Phillips is a very able one, and we commend its careful consideration to the Court. We shall refer to it briefly upon two points. In the first place, attention was called to the condition under which settlers had entered upon the school lands. To use the language of the Court:

“Such settlers went upon this land relying upon the good faith of the State. It is public history that in many instances they have undergone a hard experience. As a rule they were poor men. Many of them have lived there under rude conditions. Through long years their right to all within their lands, save in *Shendell v. Rogan* and *Chappell v. Rogan*, where it was confirmed by this Court, was not challenged until apparently by the Act of 1913.

Now after all this time, when it develops that the lands have possibly become valuable, it is proposed to deprive them of that which makes them valuable. We do not believe the State should be permitted to so enrich itself at their expense. A law which would warrant such a result should, in our opinion, be so plain and unmistakable that no court in good conscience could refuse to give it effect. The school fund is a sacred fund and should be so cherished, *but the obligations, the good faith of the State, are equally sacred.* The enhancement of the school fund at their sacrifice would make it only improper. *These elements all enter into this case.* They do not change these acts of the Legislature, but they should be properly considered in any attempt to arrive at what the Legislature meant in their enactment. If this mandamus is granted, this land, under a permit issued in virtue of the Act of 1913, may, against the will of its owner, be turned into an oil field for the benefit of strangers. The best or most useful part of the surface may be made the field of mineral operations. * * * The character of the land as a farm—the purpose for which the State sold it—may be destroyed. The surface rights may be rendered no longer of use to the owner. It is possible for the surrender of his possession to be compelled. The mandamus was refused.”

In the Green case, *supra*, the Act of April 12, 1883, contained the following provision:

“The minerals on all lands sold or leased under this Act are reserved by the State for the use of the fund to which the land belongs.”

It was urged that by the express terms of the reservation there was no authority of law for the grant of that, which by the terms, was excepted from the grant, and, therefore, that the grant could pass no title on the subject of the exception. In answer to this, it was said that while the contention was plausible, it was not sound, and that it was not sound because its necessary result was to leave open for indefinite time—to all futurity—the determination of whether that which an ordinary grant of land purports to pass is within the exception. Quoting from the opinion:

“Under such a rule, the State might not know for fifty years whether minerals in fact existed in the land granted, and accordingly whether it had any right to them. By the same rule, the settler’s land would never be free from invasion under the right of the State to at any time in the future to explore it, and all of it, for minerals, or to authorize its exploration. He would never know when his right to undisturbed possession of even the surface had matured. In truth, it never would mature. The minerals, oil and gas are fugitive and vagrant in their nature. They percolate and wander beneath the surface of the earth. *Tex. Co. v. Dougherty*, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989. They might not be in place in the land when it was granted. The land might not then contain them. It might happen, however, that at some remote period they would find

lodgment or form there. Yet, under such a rule, if they are then discovered,—the right to them which it is here claimed will attach whenever they are discovered—would be, not in the owner of the land, but in the State or some prospector holding a permit from the State. The law does not permit, nor can it wisely permit, the title to granted land or to any valuable substance contained in granted land to remain in any such state of indefinite abeyance. For actual rights to exist and for either governments or men to have security under them there must come a time when, if by their nature left uncertain, they shall be made certain. Under such a reservation as that of the Act of 1883, where there could be no right in the State to the minerals unless they in fact exist, there must be some point of time for determining whether they do exist, so that the State's right may be ascertained and reduced to certainty. And equally for the settler whom for its benefit and development the State encouraged and invited to convert a perilous frontier into a region of homes that it might some day become in itself the seat of empire, the thickly populated abode of a strong and devoted citizenship, there should be a time when he might know what rights his grant actually carried and whether he was secure in his possession of them.

“Were these important rights both of the State and the settler, to be left indefinitely contingent? Were they to continue in unlimited suspense? Were they to be determined by or be subject to the mysterious processes of natural forces beneath the surface of the earth at possibly remote periods in the future? It is

not conceivable that the Legislature so intended. If not, there being no express provision in the law on the subject, at what point of time did it intend that they should be determined? That is the real question which arises under this legislation. Its determination is conclusive of this controversy; and our own decisions, together with those of the United States Supreme Court, conclusively set it at rest. The reason for their holding, that under such reservations as this the minerals pass with the land if their existence in the land is unknown when the sovereignty confers its title, necessarily is that that is the best and fairest time for determining as to their probable existence, and is therefore the time which the law should adopt. Without other aid, it demonstrates the soundness of the holding. It reveals the justness of it. It commends it as having the essence of right and as being the inevitable decision of the question."

It is to be noted that under this case the Act of 1883, under which the State sold the land, expressly provided, that all minerals in the land should be reserved for the State. We have no such statute under our sale statute approved March 2, 1909, but instead, our statute provided for the sale of the mineral lands after January 1, 1915. And, while these lands were not mineral at the time of the passage of this Act in 1909, and should have been, under all the authorities heretofore cited, and

the Act of 1909, sold prior to January 1, 1915, they were by the Act required to be sold after January 1, 1915, if they had been mineral lands; so that our case is not involved with the legislative reservation that the Texas case was.

Our contention is that the character of the lands must be determined at the time of the grant, which we think was the *Enabling Act*.

Let us see what has been done by the State and its officials as to the determination of the mineral character of the lands involved:

First. By virtue of Section 10 of the *Enabling Act* they had the lands appraised for sale purposes January 12, 1909, which was known as the 1908 appraisement.

See appraisement, Record pages 98-99.

In this the appraisers show in questions, Record, p. 98, as follows:

"9. Any gypsum, cement, salt, mineral, gas or oil? No.

"10. Is land adjacent to mineral, gas or oil production? No."

Record, p. 99.

Actual cash value of land, \$3000.00.

Record, p. 100:

Total cash value of improvements, \$1290.00.

On March 25, 1909, the Commissioners of the Land Office by resolution approved this 1908 appraisal with exception of two quarters not here involved (Record, p. 101).

This certainly was a determination of the non-mineral character of the lands.

On August 30, 1915, the land was again appraised (Record, pp. 104-108) at \$2500.00 as its actual cash value, which was \$500.00 less than in Jan., 1909. Certainly there was not much oil value in the land then. Yet, on August 26, 1915, four days prior to the above appraisal, the Board attempted to rescind its former action in 1909 by its order segregating the lands involved (Record, p. 80).

Then on the 4th day of January, 1919, the Board executed the oil and gas lease to the Magnolia.

Questions naturally present themselves. Who held the preference rights from January, 1909, to August 26, 1915?

Where did it vest from August 26, 1915, to January 4, 1919.

Where is it vested now with the Magnolia operating under their lease?

Counsel have said Price will hold it when the Magnolia is through with the lands. If this be true, then the State can sell or trade off the timber rights, the sand rights, the stone rights, the gas rights, the oil rights, and every other element of commercial value, and, then, when entirely denuded, say to Price, "Exercise your preference rights now, on the worthless shifting sands and the worthless yellow clay, there is no further value in them."

Such a construction cannot be given to the Enabling Act and the Constitution accepting it.

Property or Vested Right in Preference Right.

In the light of all the legislation, both upon the part of Congress and upon the part of the State, up to and including the time of the authorizing of the sale of the lands involved by the Act of 1909, we must give these bodies credit with having knowledge of what the interest or property right of the lessee was as construed by the courts and considered by all persons dealing with the lands at the time.

One of the first cases determining the property

rights in a preference right is the case of *Noel v. Barrett*, 18 Okla. 304, 90 Pac. 12. This was an action by Noel, payee, of the promissory note to recover judgment against Barrett, the maker. Barrett pleaded "no consideration," alleging the note was given in consideration of the sale of the preference right to re-lease public lands. The court said in the first paragraph of the syllabus:

"By the law and regulations for leasing school lands in the Territory of Oklahoma, a lessee has a preference right to renew or re-lease, and such a right is a valuable one, subject to sale and purchase."

In the opinion the court says:

"This preference right is a valuable property right; in fact, experience and the general course of dealings in such lands has demonstrated that a preference of such leases are often of more value than the improvements on the lands, and such preference rights are the subject of sale and purchase, the same as titles to other lands."

If the preference right to re-lease is a valuable property right and a consideration to a promissory note, certainly the preference right to re-lease and to buy would be a valuable property right.

Our Court has recently followed the Noel case, and says:

“The nature of the preference right of a State land lessee is defined in *Noel v. Barrett*, 18 Okla. 304. It is said to be a valuable property right.

“Such preference rights are the subject of sale and purchase the same as title to other lands. It is clear that the preference right of a school land lessee to purchase the land is in legal effect an option. The lessee has a valid right to purchase an option and an option, even before election to purchase by the optionee, is held to create an equitable estate in the optionee.”

Clark v. Frazier (Okla.), 177 Pac. 589.

The case of *Twigg v. State Board of Land Commissioners* (Utah), 75 Pac. 729, holds:

“One who has purchased a possessory right from an original settler is entitled to the same privilege and benefits under Revised Statutes 1898, para. 2337, giving settlers of school lands, or those purchasing from them, a preference right to purchase on specified terms as his grantor would have had he continued in possession of the land and not parted with the interest therein.”

Under the Kentucky statutes, para. 4703, it is provided that actual settlers on vacant and unappropriated land should have a preference right to the land. Also provides that before any other person shall locate the same lands, three months

notice of such intention to do so must be given the actual settlers on the land. The court held:

“That without such notice, preference right could not be extinguished.”

Slusher v. Simpson, 67 S. W. 380, 23 Ky. Law Rep. 2252.

Compiled Laws of Kansas of 1879 provides that persons who “had settled upon and improved” or who are “actual settlers” upon school lands, were entitled to the right to purchase the same to the exclusion of others. *Held*, that an actual settler who was qualified was entitled to purchase the land.

Bratton v. Cross, 22 Kan. 674.

Other cases holding that the preference right is vested are the cases of *Wing v. Dunn* (Texas), 127 S. W. 1101; *White v. Douglass*, 11 Pac. (Calif.), 860.

In the very recent case entitled *Work, Secy. of the Interior v. United States Ex rel. McAlister, Edwards Coal Company*, this Court recognized the preferential right to purchase conferred by paragraph 4 of the Act of February 8, 1918, 40 Stat. L. 433, as a grant and granted to Coal Company relief prayed for in this action to protect their rights

given them under said Act. This opinion is not yet officially reported, but appears in 67 Law ed., page 640. Opinion is by the Chief Justice.

In the opinion the court says:

“We think that the preferential right of re-lator conferred by paragraph 4 of the Act of 1918 was not to be left to the legal discretion of the Secretary in the construction of this Act. There are not words to qualify that which the lessee has as a *right granted by the statute* or possessed in the Secretary the final discretion to determine or define that right.”

So in the case at bar, the State has no right to destroy or impair the preference right of Price and there is no room for construction of the Act so that any discretion in that regard is given to the State or the Board of Commissioners. They must preserve it and upon a sale he has the preference right to buy all of the lands.

Provisions in the Contract Between Officials Representing the Government, Concerning Public Lands, and Not Authorized by Law Are Unenforceable.

In the case of *Burke v. Southern Pacific Ry. Co.*, 234 U. S. 669, 58 L. ed. 1527, the court says:

“Lastly, it is urged that the railway company accepted the patent with the mineral exception therein and also expressly agreed that

the latter should be effective as one of the terms of the patent, and so is bound by it, or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the government transfers its title to public lands are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibilities are fixed by law. Neither can the land officers enter into any agreement upon the subject. They are not principals, but agents, of the law and must heed only its will (citing cases). Nor can they indirectly give effect to what is unauthorized when done directly. Of course, if they enter into any forbidden arrangement whereby public lands is transferred to one not entitled to it, the patent may be annulled at the suit of the government; but they cannot alter the effect which the law gives to a patent while it is outstanding."

The Burke case, *supra*, holds that the mineral character of the land must be determined as of the time of the grant. See also *Walpole v. Board of Land Commisisoners*, 63 Pac. (Colo.) 848 .

Subsequent Legislation Affecting the Rights of the Lessee Impair the Obligations of Contract.

In the case of *Peinoy v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, the Act of 1870 of the State of Oregon provided for the sale of certain State lands and gave the settler a certain length of time within

which to pay a part of the purchase price. Later an act under date of October 18, 1878, went into effect. The Act of 1878 provided for the cancellation of all certificates issued prior to January 17, 1879, and on this last date the settler in this case still had time within which to make his payment under the Act of 1870.

The question in this case was whether or not the subsequent legislation impaired the obligation of contract and whether or not the settler had such a fixed right or property right, which the subsequent Act could take away. The Court said in paragraph 7 of the syllabus:

“The Oregon Statute of 1887 which authorizes the cancellation of the Certificate of Sale where twenty per cent of the price of the land had not been paid before January 17th, 1879, impairs the obligation of a contract with the State which had been consummated by a compliance with the Act of 1870, and is therefore violative of the United States Constitution.”

In case of *State ex rel. v. Brown v. McPeak*, 47 N. W. 691, the law of the case, and sufficient fact for our purpose is stated in the syllabus:

“1. Under the act of 1879, the statute and leases made in pursuance thereof declared that the lessee will pay for the use of said lands the

annual rental of not less than 6 per cent per annum upon the appraised value thereof; that, at the expiration of five years from the date of the lease, and every five years thereafter, the land shall be appraised by three persons, one of whom shall be appointed by the county clerk, one by the lessee, and the third by the other two and that the valuation made by such appraisers shall, provided it be not less than the former appraisement, be the basis for the rental for the five years succeeding the next 1st day of January. *Held*, that, this being the contract authorized by statute, the legislature could not deprive the lessee of the right to select an arbitrator to act in conjunction with one selected by the state to appraise the rental value of the land for the succeeding five years.

“2. While the legislature may change or modify the remedy, it cannot, by a direct act, deprive the party of a substantial contract right.”

This opinion is written by Judge Maxwell, who was for many years the dean of the members of the Supreme Court of the State, and has always been one of the most highly respected judges in the State of Nebraska.

This case was again quoted by the Supreme Court of Nebraska in the case of *State ex rel. v. Thayer*, 64 N. W. 700.

In case of *Wing v. Dunn*, cited *supra*, 127 S. W.

1101, the courts of Texas said, first paragraph of syllabus:

“The right of a purchaser of timber on public lands under Sayles, Anno. Civ. Stat. 1897, Art. 4218Q, authorizing the sale of timber on public lands, to thereafter purchase the land on which the timber stood are contractual and vested and may not be impaired or taken away by future legislation, and where a purchaser of timber has a right under the statute to purchase the land on the terms fixed in the statute, his rights are not affected by the subsequent laws of 1901, though so intended by the legislature.”

In the case of *State ex rel. Miller, Attorney General, v. Buttzville State Bank*, 144 N. W. (N. Dak.) 105, the law stated in the syllabus is as follows:

“A state bank failed in July, 1910, having \$1,207.80 of money belonging to the State of North Dakota upon deposit therein. Upon that date section 7387, R. C. 1905, gave the State a preference right in making distribution of the assets of said bank, but this preference was taken away by chapter 101, S. L. 1911, which, however, only became effective July 1, 1911. Under these facts, held:

“That the repeal of the preference right in 1911 did not operate to defeat the claim of the State which had accrued at the time of the failure of the bank in 1910, and that the Dakota Trust Company, which had been surety upon

the bond of the bank and had paid the State the amount of the deposit, was subrogated to all the rights of the State, and should be paid under said chapter 7387, R. C. 1905."

Other cases are *Graded School District No. 2 v. Trustee of Bracken Academy*, 26 S. W. (Ky.) 8; *State v. Richman Ry. Co.*, 73 N. C. 526, 21 Am. Rep. 473.

While it is true that Section 1 of the Act appearing Session Laws 1907-08, page 486, in speaking of mineral lands provides that:

"All such mineral interests shall be reserved from sale until the year 1915, and for such additional period of time as may be determined by law."

And Section 1 of the Act appearing in the Session Laws of 1907-08, at page 490, in speaking again of the segregation of mineral lands, says:

"Such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this act."

And both of these acts were approved May 26, 1908, and both of them carried the emergency section, yet under the record in this case, the lands in controversy were not known to be mineral, nor deemed valuable for mineral at state-

hood, nor at the time these two acts were passed and not until after the commencement of this suit were they known to be mineral. Consequently, under our theory of the case, these two sections do not apply to the lands involved. Yet, if they did apply, they were repealed specifically by the Legislature in the Act approved March 2, 1909, appearing at page 448 Session Laws 1909; the first section providing for the sale of all lands in section thirty-three, including townsite and minerals lands, showing that the Legislature of 1909 legislated on the subject of sale of all the lands, and they are specifically repealed by Section 18 of this Act, appearing page 458, where it reads:

“All acts and parts of acts in conflict herewith are hereby repealed.”

It is our contention by the Act of 1909, that the State, through its Legislature, elected to convert the trust estate consisting of sections thirty-three and indemnity land, from the land itself to money under the terms, provisions, and limitations of the Enabling Act. That the Act of 1909 created a contractual relation between the defendants Price and the State, and that any subsequent legislation could not affect their rights, and would impair the obligation of contract.

**The Oil and Gas Lease Executed in This Case Grants
An Estate or Interest in the Lands.**

On the character of the estate or interest which the Commissioners of the State Land Office purport to give to the proposed oil lessee, it has been suggested, and we apprehend will or may be contended, that such "oil and gas lessee" does not acquire an ownership or interest in the land. On this, we have cited hereinbefore the terms of the instrument which purports to demise and grant "all the oil deposits and natural gas in or under" the land. We have cited *Texas Co. v. Dougherty*, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F 989, wherein was given a careful discussion of oil and gas contracts. There, as here, the contract contained the word "grant" of all the "oil, gas, coal and other minerals *in or under* the particular tract of land" and the court held that it was a *conveyance* of the property and privileges vested in the grantee a defeasible fee in the:

"Oil and gas in the ground so as to render it taxable to him, and that oil and gas in place beneath the surface are capable of conveyance as realty separate from the surface."

This is a very learned opinion and cites the best authorities on the proposition, to wit: *Ohio*

Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, holding:

“The right to oil and gas beneath his land is an exclusive and private property right in the land owner * * * of which he may not be deprived without taking of private property.”

Then, of course, lessee's preference right to buy the land extended to all, including gas and oil.

Also, Thornton on Oil and Gas, Section 19:

“Oil and gas until severed from the realty, are as much a part of it as coal or stone. * * * They must be treated as a part of the surface underneath which they lie.”

Also, Thornton on Oil and Gas, Section 20:

“The owner of the surface is the owner of the oil and gas beneath. * * * They are the subject of grant and conveyance as coal or stone.”

Gould on Waters, Section 291, says:

“Subterranean water and likewise oil, is included in comprehensive idea which law attaches to land, and that a lease for the purpose of mining oil, coal, rock, carbon, oil bases a corporeal interest subject to an action of ejectment to the same effect as *Heller v. Dailey*, 28 Indiana Appeals 555, 63 N. E. 490, and other cases cited.”

Even in Illinois and other states holding that

these minerals in place are not capable of distinct ownership, and that a conveyance of them is not a grant of the minerals themselves in the ground, but only such part thereof as the grantee may find; yet that Court held:

“That such a conveyance was the right to go upon the land and occupy it for the purpose of prospecting, if of unlimited duration, or if such right under the terms of the lease is capable of having unlimited duration amounts to a grant of the freehold in the land. *Gruener v. Hicks*, 230 Ill. 536 82 N. E. 888.”

In *People ex rel. Carrell v. Bell*, 237 Ill. 332, 19 L. R. A. (N. S.) 746, 86 N. E. 593, the question was directly involved:

“Of whether the right created by such a conveyance amounts to an interest taxable as a grant against the grantee separate from the fee taxable against its owner. The conveyance was of the oil and gas against a certain tract of land for the consideration of the payment of the royalty to the grantor; the premises to be held for one year and so long thereafter as oil or gas might be found thereon in paying quantities, constituting, as is the case in the instrument before us, a term capable of unlimited duration. * * * The Court held that the grant amounted to a freehold interest which should be taxed and assessed against the grantee.”

The court saw and distinguished in the Daugh-

erty case between instruments of grant, and instruments that convey no property interest:

“But only a bare right or privilege to go on the land and mine for minerals and reduce them to possession.”

Such is the instrument involved in *National Oil Company v. Teel*, 95 Texas 586, 68 S. W. 579. Of course, that distinction arises entirely from the language of the instruments which every careful Judge observes. The language used in instruments, whether language of permission, or language of license, or language of pledge, or language of conveyance is always distinguished; and whether or not the term is of definite or indefinite duration is judged by each instrument.

In the Daugherty case the Court cites and discusses *Southern Oil Co. v. Colquit*, 69 S. W. 169, involving:

“The question of whether the proper joinder of wife was necessary in the conveyance of such minerals in place under a tract constituting a homestead, together with a right to make use of the land for the purpose of their production from the earth.”

It will be noted this is almost identical with

the instrument involved at bar. The Texas Court held that it was necessary to join his wife,

“for the reason that such a conveyance amounted to the conveyance of an interest in the land itself. This Court refused writ of error (Texas Supreme Court). It could have done so only under the view that the interest created by the instrument was an interest in the realty itself, requiring for its validity the joinder of the wife because of the homestead character of the realty.”

The Court further said:

“Here the instrument expresses a present grant of the minerals in place for a consideration which was valuable and independent of any obligation resting upon the grantee.”

The Supreme Court of the State of Oklahoma in *Hoyt v. Fixico*, 175 Pac. 517, — Okla. — (not reported), said at page 518, column 1:

“That the Circuit Court of Appeals in *Parker v. Riley*, 243 Fed. 42, 155 C. C. A. 572, had occasion to construe the Act of May 27, 1908, with reference to an oil and gas mining lease and reached the conclusion that a lease of a restricted homestead for oil and gas or other mining purposes under section 2 of said Act, *was an alienation of that part of the land constituting the homestead which the lease permits the lessee to take from it by the discovery and removal of oil and gas and other minerals therein.*”

And says otherwise:

“Would defeat the purpose and intent of Congress, for any full-blood heirs would thus be enabled to dispose of their most valuable property right without the protection which the government intended they should have.”

And again:

“While, strictly speaking, an oil and gas mining lease does not convey an estate in the realty prior to development of the leased premises, it operates to pass the immediate and exclusive right of possession of the land for the purpose named in the lease, and upon discovery of oil and gas, or either of them, the lessee acquires a vested right to extract and remove from the premises and apply to his own use the oil and gas found therein, and such a lease is an alienation of that part of the land which the lessee takes from it, converts into personal property and appropriates to his own use.”

This Court evidently restricts this opinion to “leases” strictly speaking, and distinguishable from “grants” in place with permission to take, as the instrument at bar was carefully made to be. It will be noticed from the lease proposed to be granted here, that under the language of the decision above quoted, it would:

“Pass the immediate and exclusive right of possession of the land for the purpose named in the lease.”

This can not be other than an invasion of the right of possession of the lessee and an invasion of his preference right to purchase that very privilege, interest or estate (whatever it may be called) as against all the rest of the world, secured to him by the Enabling Act; and if such a lease

“Is an alienation of that part of the land which the lessee takes from it,”

it must likewise and necessarily deprive the lessee of the preference right to buy and hold for his own use under the preference right, given him by the Enabling Act, of that very thing which this instrument undertakes to take away from him.

In *Fixico* it is said:

“The Supreme Court of the United States in *United States v. Noble*, 237 U. S. 74, 59 L. ed. 844, held that the assignment of rents and royalties accruing under an oil and gas lease, was a ‘conveyance of an interest in the land,’ and that the lessee had no power to convey his interest in the land, had no power to convey that part of it which consisted of rents and royalties” (175 Pac. 518).

These decisions are conclusive from our two highest courts. If the lessee’s seven-eighth oil, and the royalty reserved in oil and gas conveyance, is an interest in the land, it is impossible to logically

and honestly say that the Board, or the State, can give away seven-eighths of the value to secure the one-eighth; just as Texas said, *supra*. Or, to quote the Texas Supreme Court:

“In other words it conveys the substances named themselves in the ground and not simply the right to take them from the ground.”

Texas Company v. Daugherty, supra.

The difference in the estate conveyed depending on the difference in the language of the instrument must be kept ever in mind in reading the decisions relating to various oil and gas contracts. Here the board essayed a straight grant of the oil and gas “in and under” the land for one-eighth of it. A present grant of the thing, to be paid for by subsequent payments, of portions thereof; an instrument of conveyance.

From this line of authorities, it is clear that four points are settled: That an instrument, like the Magnolia lease, is, if valid, a conveyance of a part of real estate. That it operates to pass the immediate and exclusive right of possession of the land for these purposes, and is an invasion of the former lessee's property. That it is a conveyance of part of real estate for other than money, to wit,

a percentum of the value, and a diversion of the proceeds from its dedicated purposes. That it is, therefore, void.

Legislature Can Not Delegate the Power Given it by the Enabling Act and the Constitution.

A very interesting case on this subject, as well as other subjects heretofore discussed in this brief, is the case of *Walpole v. State Board of Land Commissioners*, 163 Pac. (Colo.) 848.

The *Colorado Constitution, Section 10 of Article 9*, is as follows:

“It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale or other disposition of all the lands heretofore, or which may hereafter be granted to the State by the general government, under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor.
* * * The general assembly shall provide for the sale of said lands from time to time; and for the faithful application of the proceeds thereof in accordance with the terms of said grants.”

It is to be noted that by this section of the Constitution, the Board of Land Commissioners were mentioned and given some authority by the Constitution, while under our Constitution, no mention of them was made.

Pursuant to this section of the Constitution, the legislature passed an act which appears at Section 5185 of Revised Laws of Colorado, and is as follows:

“* * * Whenever a purchaser of any state land, state has complied with all the conditions of the sale, and paid all purchase money with the lawful interest thereon, he shall receive a patent for the land purchased; such patent shall be signed by the governor, attested by the secretary of state, and countersigned, by the register, and have the great seal of the state and the seal of the state board of land commissioners thereto attached; and when so signed, such patent shall convey a good and sufficient title in fee simple.”

Section 5 of the Act approved March 2, 1909, appearing at Session Laws 1909, page 453, reads as follows:

“The state shall have first lien upon all lands sold under this act, together with all improvements and appurtenances thereunto belonging until all payments, both principal and interest, are made thereon, and upon such payments being made, the Commissioners of the Land Office, in forms of law, shall execute to each purchaser as in this act provided, a patent in fee simple; provided, a certificate of purchase, reciting the conditions of such purchase, shall be issued to every purchaser under this act immediately upon execution of the contract of purchase and such certificate of purchase shall

be entitled to record, as evidence of the same, under the provisions of the law of conveyance."

It will be noted that Section 5185 of Revised Laws of Colorado and Section 5 of the Oklahoma Laws of 1909, are identical in meaning; each of which contemplated conveyance of title in fee. Pursuant to the Constitution and laws of Colorado, the State Board of Land Commissioners proceeded to sell the particular tract of land, and in the notice of sale, they put the following provision:

"Reserving, however, to the State of Colorado, all rights to any and all minerals, ores and metals of every kind and character, and all coal, asphaltum, oil, and other like substance, in and under said land, and the rights of ingress and egress, for the purpose of mining, together with as much of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances."

At the time of this sale, the plaintiff was present and purchased the quarter section and made the first payment and arranged for payment of the land in annual installments and received the certificate of purchase in which was printed the reservation as it read in the notice. The sale and purchase was made November 3, 1909. In December, 1910, the State Board executed a mining lease to

one Kirchhoff to the lands in controversy. In discussing the case, the Court said:

“Under this section of the Constitution, the board does not in any sense stand in the position of an owner. It is a mere agent, with a duty to do no less, and power to do no more, respecting the disposition of State lands under its control, than is provided”

by law. The Court then takes up what is meant in the various sections of the statutes providing for the sale of “lands.” The Court, in discussing the authority of the Board, states as follows:

“Where the policy of the law and its command is that a purchaser of public lands shall receive a good and sufficient title in fee simple, surely officers charged with the administration of the law cannot lawfully agree to or convey, any other title, because the express mandate is an implied prohibition against any other manner of disposition. Nor can a purchaser, by agreement or acquiescence, clothe land officers with such authority, because that which is inhibited by law can never be made lawful by consent of the parties affected. When a patent is issued, it must be deemed the grant of a good and sufficient title in fee simple, and if it contains any reservations or exceptions which are inconsistent with or repugnant to the grant of such an estate, they must be held to be invalid under the rule which declares that reservations or exceptions which are repugnant to the grant are void. 15 Cyc. 675.

“We conclude, therefore, that where state lands are sold, the Board has no authority to sell less than the whole, and until authority is given it to sell less, like surface rights, or other partial interest, it may not do so. The Constitutional provision which establishes the land board also places its control and regulation with the legislative department of government, and the board can act only within the limits and in the manner prescribed by that body. As the law does not vest the land board with authority to make any reservation when it sells state lands, the one attempted in the contract here involved is a nullity, and without effect for any purpose.”

The Court, in the syllabus, laid down the law as follows:

“1. Under Const. Art. 9, para. 10, requiring the State Board of Land Commissioners to provide for the sale, etc., of state lands as may be prescribed by law, the board's powers are strictly limited by statute.

“2. Under Rev. St. Paras. 5167, 5185, providing the conveyance of state lands shall vest a title in fee or fee simple, the State Board of Land Commissioners has no power to reserve the mineral rights in such conveyances, and such reservation is void.

“3. A purchaser's knowledge that a mineral reservation would be incorporated in his conveyance from the state, his payment of purchase-price installments after knowing state officials had granted a mining lease covering his property, and his application for such a lease

do not estop him from contesting the validity of such mineral reservation.”

Our Court, in the case of *Betts v. Commissioners of the Land Office*, 27 Okla. 64, 110 Pac. 766, had occasion to discuss the power of the Board.

The question arose in this case as to what power and authority the Commissioners of the Land Office had to pay employees in running the department, and from what funds they should be paid. The Court, in the opinion, quotes the Colorado Constitution heretofore quoted in the Walpole case and also the Colorado cases construing that provision of the Colorado Constitution and discussing the power of the legislature to delegate any of its powers, to the Board, the Court says:

“The first legislature of the state passed an act entitled ‘An act to confer on the Commissioners of the Land Office, consisting of the Governor, Secretary of State, State Auditor, Superintendent of Public Instruction and the President of the Board of Agriculture, authority to manage, loan, invest and regulate the investment and deposit of the permanent school funds.’ See Sess. Laws 1907-08, pp. 664, 665. And Section 4 of said act provides: ‘The Commissioners of the Land Office may appoint such assistants and incur such expenses as are necessary in the management and handling such property and funds, and shall pay such ex-

penses out of the *income of the school funds.*' Said section is repugnant to the Constitution for several reasons: (1) It attempts to confer or delegate legislative power, which was by the terms of the Constitution lodged in the legislature, upon said board, so as to authorize it to determine the number of employees needed and fix their salaries. This is not permissible as to enactments by our state legislature since the organization of the state government. *State ex rel. Rush v. Budge et al., State Capitol Com'rs*, 14 N. D. 532, 105 N. W. 725. See, also, *Cutting v. Taylor*, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691. (2) It attempts to authorize the expenditures of a part of the interest of the permanent school fund as constituted by Sec. 2, Art. 11, Const., to pay the expenses of loaning, investing, or reinvesting same, which is not permissible. (3) It attempts to make an appropriation without complying with the requirements of section 55 of article 5 of the Constitution. See *Menejee, Treasurer, v. Askew, etc.* (decided at this term, but not yet officially reported), 107 Pac. 159. On March 22, 1909, the second legislature enacted an act entitled, '**An act providing for the manner of procedure in leasing the public lands of the state and declaring an emergency.**' See Sess. Laws 1909, pp. 440-448. By the terms of this act rules and regulations were provided for the manner of procedure in leasing such lands, but no provision was made relating to the payment of the expense of the leasing of the same. Everything else was done in order to comply with the requirements of section 10 of the enabling act except to provide for the payment of the expenses of the leasing department by means of

an appropriation. And so, with the adjournment of the second legislature, the provision that was brought over from the Territory of Oklahoma under the terms of section 10 of the enabling act, relating to the payment of the necessary expenses and costs of the leasing of said land, still remained in force."

By analogy, many paragraphs of the syllabus and the opinion are instructive on the case at bar, for the reason that all through the opinion the state is treated as a trustee and not the owner of the land and the Board of Commissioners is treated and determined to be an agent of the trustee. Also the entire opinion gives full effect to every provision of the Enabling Act relative to the lands, and relative to the fund, and determines that the Board would have no power to expend money with or without legislative enactment that would violate the provisions of the Enabling Act.

In the case of *Haskell v. Haydon*, 126 Pac. 232, 33 Okla. 578, the Court had under consideration the question of whether or not Haydon had a preference right to buy, under the act approved March 2, 1909, 640 acres of land instead of 160 acres; and in the discussion of that question it was necessary to construe the provisions of the Enabling Act and the Constitution, concerning the public lands; par-

ticularly Section 33, and indemnity land. They recognize in this opinion, and so state the law, that the Constitution requires the land to be sold under the provisions of the Enabling Act "for the uses and purposes and under the conditions and limitations for which the same were granted and donated." They recognize and enforce the provisions of Section 9, which provides those tracts shall be sold "under such rules and regulations as the legislature of said state may prescribe, preference right to purchase at the highest bid being given to the lessee." And the third paragraph of the syllabus holds that the exclusive power to make rules and regulations is with the legislature; said Section 3 of the syllabus reading as follows:

"Section 4, Art. 11, of the Constitution, confers upon the legislature exclusive power to prescribe, 'in conformity with the regulations of the enabling act,' rules and regulations for the sale of all public lands set apart to the state by congress, and all lands taken in lieu thereof, for charitable, penal, educational, and public building purposes."

A number of cases can be found construing the provisions of various enabling acts in which it is held that the provisions of the enabling act, di-

recting the protection of the funds derived from the lands granted, are controlling.

State ex rel. v. Millau, 96 N. W. (N. Dak.) 310.

Betts v. Commissioners of the Land Office, 110 Pac. 766, cited *supra*, 27 Okla. 64.

Haskell v. Haydon, 33 Okla. 578, 126 Pac. 232.

A late case is the case of *Erview, Commissioner of Public Lands of New Mexico v. United States*, 251 U. S. 41, 64 L. ed. 128. In this case the legislature passed an act providing that three cents on the dollar of the annual income from sales and leases of public lands which were granted under the enabling act, should be used for the purposes of making known the resources and advantages of the state generally, and particularly to homeseekers and investors. The United States brought an action to enjoin the diversion of the funds and the Supreme Court of the United States sustained the action. If the diversion of this small amount of money, which might reasonably be expected to cause the increase in the demand, and probably the enhancement of value of the remaining lands in the state and thereby permit the state to obtain a greater amount of money for its total acreage of lands, is

violative of the provision of its enabling act, certainly any legislation by our state that would permit the bartering and giving away of seven-eighths of the oil interest in the land in consideration of its development and the bonuses paid would be violative of the terms and provisions of our enabling act. It is apparent from this case that it is not a question of whether or not it would be good business judgment, nor is it a question of whether or not the appropriation in such manner might or might not be advantageous to the fund; but it is the language of the enabling act that controls and the state is not permitted to violate it. So it is our contention that the state could only lease lands known to be mineral at the time of statehood for the limited period of five years, and that the sale contemplated by the enabling act and the Constitution was a sale of the lands and not a bartering and giving away of the most valuable element of mineral land.

**Defendants Are Entitled to Protect Their Possession
by Injunction.**

In the cross-petition of defendants, they have asked for an injunction against plaintiff and intervenor, enjoining them from interfering with their possession.

In case of *Schwab, Co. Treas., v. Wilson*, 84 Pac. (Kan.) 124, the Court says:

“It is seriously urged, however, that Wilson, plaintiff below, can not maintain this action because he has no interest in the land in controversy peculiar to himself and different from the interest of the public generally. When a man settles upon school land with the intention of becoming the purchaser, and erects improvements thereon of the value of one thousand dollars, including a permanent dwelling and occupies the land as a home for himself and a large family, and says it is the only home he has and all he has in the world in the way of property, it would seem he has such an interest in the land from that enjoyed by the public generally as will entitle him to enjoin an officer from selling it.”

In this case, Wilson was the settler on the land, and as such had the right to purchase. The county treasurer attempted to sell the land as lease land which was alleged to be in violation of the rights of Wilson. This action was brought to enjoin him. The Court declares the law in the syllabus, to be in substance as stated in the opinion above quoted.

The pretended order of segregation in this case was not made until August, 1915. The lease between the intervenor and plaintiff was not made until 1919. The attempt to take possession was not

made until 1920. At all times Price was in possession and under the exclusive control of the lands in controversy. The plaintiff was charged with notice of whatever rights of claim defendants had to the lands by reason of such possession.

The courts have always protected the possession by injunction of the person claiming under any of the laws of Congress authorizing the settlement, or acquiring of the title, or any similar state laws, or of a person claiming title thereto not directly under any legislative enactment and in possession thereof.

Pennoyer v. McConaughy, 140 U. S. 1, 35 L. ed. 363.

Burnett v. Sapulpa Refin. Co., 159 Pac. (Okla.) 360.

Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732.

Payne v. Cen. Pac. Ry. Co., U. S. Sup. Ct. Adv. Op. No. 10, dated April 1, 1921, at page 344.

Price Has Preserved His Rights and Done All Required of Him By Law.

Counsel have heretofore urged the Frisbie and Hutchins cases quoted below as supporting the theory that there is no vested right to the public lands in Oklahoma, in the lessee; and in the consider-

ation of these cases, together with other cases in the Supreme Court of the United States, it is necessary to refer to the legislation they were construing at the time that the opinions were written.

By Section 3 of Article 4 of the Constitution of the United States, it is provided:

“Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

In the case of *Frisbie v. Whitney*, 9 Wal. 187, 19 L. ed. 668, the controversy arose under the provisions of the Act of Congress approved September 4th, 1841, found 5 Stat. L., page 453, Section 10 of this Act appearing in Vol. 5 Stat. L., page 455, designates the class of persons who may enter and their qualifications and requires that they must have made a settlement in person since the first day of June, 1840, or after the passage of the Act, and provides such person shall inhabit and improve the same and has, or shall, erect a dwelling thereon, he then shall be, and is hereby

“Authorized to enter with the Register of the Land Office for the district in which such land may lie by legal sub-divisions any number of acres not exceeding one hundred sixty, or

a quarter section of land, to include the residence of said claimant upon payment to the United States the minimum price of such lands *subject, however, to the following limitations and exceptions.* * * * No lands included in any reservation by any *treaty, law or proclamation of the President* of the United States, or reserved for saline, or for other purposes. * * *

Many other exceptions and limitations are named in the Act, but this one quoted serves the purpose for illustration and is the one particularly applicable in considering this case. It will be noted from a reading of the Act that *the entry* under the Pre-emption law called for, is the filing of their claim and payment of the money in the Land Office and is not *the settlement* on the lands.

Section 14 of the Act appearing page 457, reads as follows:

“That this Act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the Proclamation of the President, nor shall the provisions of this Act be available to any person or persons who have failed to make the proof and payment and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.”

Section 12, at page 456, provides that the proof of settlement and improvements must be made to the

satisfaction of the register and receiver before the entry is made under the Act.

The land involved in the Frisbie case was for many years thought to be a tract of land granted to one Vallejo by the Mexican Government, but by decision of the Supreme Court of the United States, this grant was held to be void. When this decision became known, a mad scramble took place to gain possession of the land under the Pre-emption law and attempting thereby to dispossess the persons who had held the land for years under a chain of title from Vallejo. Frisbie held possession of the land by reason of the chain of title from Vallejo. A short time after this decision, Congress passed an act for the protection of the persons claiming under Vallejo. Under this act, Frisbie made his entry and complied with its terms and Whitney sought by this action to compel Frisbie to convey him his title so received from the Government under the claim that the land was open to the Pre-emption laws and he had made settlement thereon under the Pre-emption laws. Whitney applied to the land office and offered to make his declaration on the grounds only that he had come on the land, built a house and barn and perhaps enclosed some of the land, mak-

ing no payment or other proof. They refused to receive it; first, because no surveys had been made by which the land could be identified and afterwards the remedial acts passed by Congress. Whitney never paid money to the Government and never received his certificate of entry. Under this state of fact, the Court held:

“That settlement on the public lands of the United States, no matter how long continued, confers no right against the Government. The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvements and has paid the requisite purchase money. Rights created by the statutes must be governed by their provisions, whether they be hard or lenient.”

In the case of *Hutchins v. Low*, 15 Wal. 77, 21 L. ed. 82, Congress had passed an Act in June, 1864, granting to the State of California, the famous Yosemite Valley, to be held by the state in perpetual reservation for certain expressed uses. By legislative enactment the State of California accepted the same with the reservations, stipulations and conditions contained in the Act of Congress. Six weeks previous to the passage of the Act granting the lands to California, Hutchins entered the valley and settled upon the lands therein under the Pre-

emption laws of the United States and purchased certain improvements which were then on the land. The valley at that time was unsurveyed and no other act was done by Hutchins to acquire the title except to solicit the state and Congress to recognize his claim. Under this state of facts, he attempted to hold the lands and claim title thereto.

This case, like the Frisbie case, simply holds that Hutchins had no rights vested in him under the Pre-emption law for the reason that he had not yet put himself in a position to demand title under the Pre-emption law. He had simply filed his declaration; he had not submitted his proof, he had not paid the purchase price; his entry had not been accepted by the Land Office and, as it stated in this case in referring to the Lytle case, the Court said:

“In the case from Arkansas, the right of Cloyes had been defeated by the failure of the executive officers to perform their duties under the law; he having complied fully with its provisions except so far as he was prevented by such failure, and having thus acquired a right to the title of the Government, in the present case, no default on the part of the executive officers is alleged or pretended. The ground of complaint is that the defendant could not acquire title under the Pre-emption laws, because Congress had granted the land to the state and

thus withdrawn it from sale. In the one case *it is the action of the executive officers* which is the ground of complaint; in the other it is the *action of Congress.*”

This is an exact statement of the conditions of which we are complaining in the case at bar. Here the state has directed the sale of the Price land. The officers have failed to perform their duty under the act by selling the lands. If the state in the case at bar owned the lands without limitation or exception as the Government did in the Yosemite Valley case, and had simply passed an act saying that when a settler had done certain things and filed certain proofs and paid certain moneys, it would convey him a title; then these cases would be in point in the case at bar, but the state here in the first place could not do so and comply with the terms of the Enabling Act, and in the second place, they have absolutely directed the sale of the lands in controversy.

The case of *Lytle v. The State of Arkansas*, 9 How. 333, 13 L. ed. 153, is discussed at length in the case of *Hutchins v. Low*, *supra*, and the distinction is very clearly brought out.

In the Lytle case certain lands were by virtue

of the Pre-emption Act of May 29, 1830, conferred upon settlers upon proof and settlement, and improvements made to the satisfaction of the register and receiver. The proof in this case was taken and the money was paid and received by the Land Office and the Court held that no subsequent act of Congress could take away the right of the Pre-emptor. In other words, the Court held in the Lytle case that the bargain had been made and that it was binding on both persons. So we contend in the Price case.

The case of *Burton v. Traver*, 130 U. S. 232, 32 L. ed. 920, is a case arising under the Pre-emption laws. The Court very clearly reviews the situation of the settler under the Pre-emption laws and the United States in the following statement in the opinion:

“Neither of these grounds is well taken. No portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the township embracing the land has been returned to the local land office. A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified

time after the surveys, and the return of the township plat, the settler takes certain steps, that is, files a declaratory statement such, as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of pre-emption to the land, that is, a right to purchase it in preference to others. Until then he has no estate in the land which he can devise by will, or which, in case of his death, will pass to his heirs at law. He has been permitted by the government to occupy a certain portion of the public lands and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to pre-empt it. The United States makes no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him—if you wish to settle a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands, which are vacant and have not been reserved from sale; and when the public surveys are made and returned the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them. If those steps are, from any cause, not taken, the proffer of the government has not been accepted, and the title in the occupant is not even initiated. The title to the land remains unaffected, and a title in the occupant is not even initiated. The title to the land remains unaffected, and subject to the control and disposi-

tion of the government, as before his occupancy."

The Court here specifically recognizes the fact that under the pre-emption laws, only surveyed lands were subject to it, and that until they are surveyed they would not apply. No such condition is in the case at bar. After they are surveyed and the returns made of the survey, the settler must take certain steps; that is, file his proof, etc. There is nothing of that kind required of Price. Certainly, it would not be contended that Price's property interest in the lands involved here is not subject to sale or capable of being devised by will, or in case of his death, pass to his heirs at law, because each case that our court has passed upon has recognized the property right in both the right to re-lease and the right to purchase at the time of sale.

It is also noted that this case gives full effect to the proviso of the pre-emption law under consideration, providing that the entry shall not be permitted if the lands have *been withdrawn by law, treaty or proclamation of the President*. There is no provision of our law permitting these lands to be withdrawn from sale excepting that provision in the Segregation statutes of 1907-08 which was repealed

by the Act of 1909, and which violates the provisions of Section 8 of the Enabling Act when applied to lands not then known to be mineral, and after our rights had become thus fixed, they could not, afterwards, be taken away from us.

Upon the consideration of these cases, it should be noted that counsel has not attacked the findings and judgments of the Court except on the law, and that the *Court has found that the Prices have done all that was required of them under the law to do.* A very pertinent question was propounded to counsel by the trial court in the hearing below when he asked "if the Board had the power to segregate lands at any time and without hearing, would not such administrative order have the effect of repealing the Act of the legislature directing the sale? And, could not the board segregate all state lands arbitrarily, thereby prevent the sale of any of them, and thus defeat the sale statute?"

The Lytle case, quoted, *supra*, has been cited and followed recently by our Supreme Court. The case of *Payne v. Central Pac. Ry. Co.*, 255 W. S. 228, was a case where the railway company was permitted under the Granting Act to select lien sections

for sections lost under the grant of specific sections by reason of some prior appropriation; and the Act provided that the same should be subject to the approval of the Secretary of the Interior. The railway company selected its lands and filed its list; the president attempted to subsequently withdraw some of the lands as a water power site under the Act of June 25, 1910, and thereafter the secretary refused to approve the list. The Court, in discussing the case, says:

“It is not questioned that, had the selection been reached for consideration before the withdrawal, it would have been the duty of the commissioner and the secretary to approve it and pass the lands to patent; nor that, if the withdrawal be not an obstacle, it still is their duty to do so. But it is insisted that, so long as the selection was without the secretary's actual approval, it gave no right as against the government, and that the withdrawal, made while it was as yet unapproved, became a legal obstacle to its approval. In this there is an obvious misconception of the office and effect of the selection, and the misconception is particularly shown in the brief for the appellants, where the selection is treated as only a preliminary land application or filing. Counsel there say: ‘What is the effect, then, of the mere filing of an indemnity selection? Its effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter.’”

In discussing the power of the Secretary of the Interior and the purpose of the law, the Court said:

“Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But, of course, it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress, as manifested in the granting act” (citing cases).

As to the interference with private rights, the Court said:

“Besides, to apply the act to the lands in question, lawfully earned and selected as they were, would work such an interference with private rights as plainly to require that it be construed as not including them” (citing cases, including the Lytle case).

In the case of *Payne v. New Mexico*, 255 W. S. 367, the State of New Mexico was authorized under its Enabling Act to make certain selections in lieu of any of the public lands passing under school land grant that might be included in a public reservation. The state made the selection and submitted it to the Secretary of the Interior. Subsequently the bound-

aries of the reservation involved were changed so as to exclude the original land from the reservation. The question then arose whether the state should be compelled to take the original land, or whether they had a vested right in the selected lieu lands which they could enforce. The Court held that the state had a vested right in the selected lieu lands. In discussing the case, the Court said:

“In the brief for the officers it is frankly and rightly conceded to be well settled that ‘a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the government, and that his right to a legal title is to be determined as of that time;’ and also that this rule ‘is based upon the theory that, by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his, and the government holds it in trust for him’ (citing *Lytle v. Arkansas*, *supra*, and other cases). But it is said that as the selection is ‘subject to the approval of the Secretary of the Interior,’ no right can become vested nor equitable title be acquired thereunder unless and until his approval is had; and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected,

and of approving or rejecting the selection accordingly. The power conferred is 'judicial in its nature,' and not only involves the authority, but implies the duty, 'to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.' "

So, in this case, where the finding of fact is that Price has done all that is required under the law for him to do to perfect his claim, he is the equitable owner of the lands and the Board of Commissioners would have no power to declare his land segregated in order to accomplish the non-sale of the lands when they were not known mineral lands and when his rights had attached long prior to the attempted segregation or the attempted leasing of the land for mineral purposes.

The same principle is announced in case of *Wyoming v. United States*, 255 W. S. 489.

Right to Complete Initiated Title.

Where the right has been initiated by grant, or by voluntary act the one receiving the grant or initiating the right is entitled to protect his possession and his enjoyment thereof and to prosecute his proceedings for the perfection of the legal title.

He has the right to defend against trespassing of third parties.

Atherton v. Fowler, 96 W. S. 513, 24 L. ed. 732.

Haws v. Victoria, etc. Co., 160 W. S. 303, 40 L. ed. 436.

Earhart v. Board, 113 W. S. 527, 28 L. ed. 1113.

New England Oil Co. v. Congdon, 92 Pac. 108.

Miller v. Crissman, 73 Pac. 1083.

Del Monte v. Last Chance, 171 U. S. 75, 43 L. ed. 72.

Also against subsequent legislation where his claim has been accepted under prior legislation.

Union Pac. v. Harris, 215 U. S. 386, 54 Law ed. 246.

Washington & Idaho Ry. Co. v. Osborne, 160 U. S. 103, 40 Law ed. 356.

Possession of property is, of course, notice to the world of the claims of the possessor.

The Legislation Made a Contract.

Prior to the time that the State accepted the grant tendered it by the Enabling Act, the Government had a right to do as they pleased with the lands involved.

Union Pac. v. Douglas, 31 Fed. 520.

Union Pac. Ry. Co. v. Karger, 169 Fed. 459.

Territory of Oklahoma v. C. O. & W. Ry. Co., 20 Okla. 663, 95 Pac. 420.

Minn v. Batchelder, 68 U. S. —, 17 L. ed. 551.

After the acceptance by the State of a grant given by the Enabling Act, and the passage of the Sales Act of 1909, it bore all the relations of a contract and the lessee Price was entitled to have the land sold and to perform whatever conditions subsequent may be necessary.

The Supreme Court of the United States has so said in case of *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363:

“The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal standing offer by the state of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof with the board, and complying with the subsequent conditions of payment and reclamation. The application is a written acceptance of the offer of the state, in relation to the land described therein, and, on the filing of the same, the minds of the seller and the purchaser—the state and the applicant—came together on the proposition, and thenceforth there was an agreement between them for the sale and purchase of that parcel of land, binding on each of them until released there-

from by some substantial default of the other, not overlooked or excused.”

All legislation had tendered to, and guaranteed to these lessees that if they leased these lands they could take them on these terms and with these expectations. By taking and holding leases, they offered to do so. State legislation was an acceptance of these offers. Their minds met and the contract was forever closed. The later statutes and acts of the Commissioners to the extent they attempted derogation thereof were violatiive thereof, nugatory, and void.

“That legislation surely impaired the obligation of the contract owner (here lessee Price) had with the state, for its effect was to destroy valuable property right and privileges belonging to him. It was, therefore, violative of the Constitution of the United States, Article 1, paragraph 10. The statute * * * affords them (Magnolia Petroleum Co. and State) no security or immunity for the acts complained of; it cannot be said therefore that this is a suit against the state within the meaning of the Eleventh Amendment.”

Pennoyer v. McConnaughy, 140 U. S. 1,
35 L. ed 363 (at page 371).

As to the occupant lessee, he occupied the relation of contractor who had accepted proposition

of Congress, and whose proposition had been accepted by the State. He held a vested right; and is and was entitled the security of the Constitution of the United States and to undisturbed enjoyment of what he had so richly earned, as against this Magnolia trespass.

Lessee Title Is Ancient Fee Farm.

It is to be noted that under the legislation Price and his predecessors in title had the right to re-lease until statehood, provided he did not commit waste and paid his annual rentals; that by the statutes enacted immediately after statehood the right to re-lease was reaffirmed in the lessee subject to his default of rental payments or the commission of waste. In addition to this he had the preference right to buy under the Enabling Act, the State Constitution and Sales Act of 1909. This did not give to the government or the state a right of reversion. It gave to the state the right to re-entry upon the failure of Price to perform a condition subsequent. Neither the government, the state, or any one else could alienate the land without his consent.

By the lease statute of 1909, Section 2, the rental price of all lands is fixed at four per cent of its ap-

praised value and the Act provided that a reappraisement be made each fifth and tenth years, and the rent changed accordingly. By the legislation the annual rentals were fixed dependent on valuation only. This effectually under the law for re-leasing gave to the lessee the equitable fee simple title and gave to the state the right only to perpetually correct the annual rental of the land. Price held what was known under the old English common law as a fee farm. The state had the right to the fee farm rent. Fee farm is defined as:

“Land held of another in fee—that is, in perpetuity, by the tenant and his heirs at a yearly rent without fealty, homage or other service than such as are specially comprised in the feoffment.”

A very learned discussion of this title will be found in *DePeyster v. Michael*, 6 N. Y. (2 Selden) 467, 57 Am. Dec. 470. In the opinion it is said:

“The right of re-entry for nonpayment of rent, or the non-performance of other covenants, is not such an interest in the estate as makes the condition in question valid. It is not a reversion, nor is it the possibility of reversion, nor is it any estate in the land. It is a mere right or chose in action, and if enforced the grantor would be in, by the forfeiture of a condition, and not be a reverter. At common law, a right of entry, being a mere right of ac-

tion, could not be granted over. Quotes Littleton 214; 2 Cru., Tit. 18, C. 1, Sec. 15."

And further:

"When property is held on condition, all the attributes and incidents of absolute property belong to it until the condition be broken; and this is especially true, when, as in this case, the person entitled to the benefit of the condition is not in any degree affected in his right, under the condition, by the exercise and enjoyment of those attributes and incidents. The lessor's right of entry for breach of the lawful conditions is not defeated or impaired by the sale of the lessee's interest in the land."

The court further says in *DePeyster v. Michaels*, 57 Am. Dec. 470, at page 478:

"The lease on which this action is brought created an estate of inheritance in the grantee, his heirs and assigns. It is a fee-simple estate, subject only to the payment of the rents reserved, and to the performance of the lawful conditions contained therein. It is what was anciently called a fee-farm estate. A fee-farm rent is a rent charge issuing out of an estate in fee. A grant of lands in fee reserving rent is only letting lands to farm in fee simple instead of the usual methods for life or years; 2 Bla. Com. 43; Hargraves' Notes, 143 b, note 5. A fee-farm rent is a perpetual rent reserved on a conveyance in fee simple: 3 Cru. 284. Fee farms are lands held in fee to render for them annually the true value, or more or less, and is called a fee farm because a farm rent is reserved upon

a grant in fee: 2 Inst. 44. It is expressly said in the statute *QUIA EMPTORES* that it extends only to lands holden in fee simple; 1 Evans' Stat. 195, Sir Edward Coke declares that it extends to lands held in fee farm: 2 Inst. 502. These references are made for the purpose of showing that the estate creat'd by leases like the present are estates of inheritance; that they are classed among estates in fee simple: *THAT NO REVERSIONARY INTEREST REMAINS IN THE LESSOR*; and they are, therefore, subject to the operation of the legal principles which forbid restraints upon alienation, in all cases where no feudal relation exists between the grantor and grantee.

“Restraints upon alienation of lands held in fee simple were of feudal origin. A feoffment *IN FEE DID NOT ORIGINALLY PASS AN ESTATE IN THE SENSE IN WHICH WE NOW UNDERSTAND IT*. The purchaser took only an usufructuary interest, without the power of alienation in prejudice of the heir or of the lord. In default of heirs, the tenure became extinct and the land reverted to the lord. The heir took by purchase and independent of the ancestor, who could not alien, nor could the lord alien the seignory without the consent of the tenant. This restraint of alienation was a violent and unnatural state of things, contrary to the nature and value of property, and the inherent and universal love of independence. It arose partly from favor to the heir, and partly from favor to the lord, and the genius of the feudal system was originally so strong in favor of restraint upon alienation, that by a general ordinance mentioned in the book of Fiefs, the

hand of him who wrote a deed of alienation was directed to be struck off; 3 Kent's Com. 506. The same learned commentator proceeds to give an outline of the various causes which gradually led to the mitigation of these severe restrictions until they were finally removed (except as to the king's tenants *IN CAPITE*), by the statute of *QUIA EMPTORES TERRARUM*."

In this, note especially these expressions:

"A fee-farm is a rent charge issuing out of an estate in fee. A grant of lands in fee reserving rent is only letting lands to farm in fee simple instead of the usual methods for life or years: 2 Bla. Com. 43; Hargrave's Notes 143 b, note 5. A fee-farm rent is a perpetual rent reserved on a conveyance in fee simple; 3 Cru. 284."

Here the lessee took by Act of Congress on a perpetual rent subject only to payment thereof reserved, which right of payment could be offered for extinction for a gross sum; but always lessee held the preference right to be the lessee, and pre-right of pre-emption, that is, to be the purchaser of that right to collect; so his term, unless he sold out, was perpetual as against lessor, and passed to his heirs and was unrestricted as to alienation. *Noel v. Barrett* and *Clark v. Frazier, supra*. A fee-farm, it seems, and it was not subject to escheat or fealty under any law to be then, or now, considered a part of the statute contract.

State Supreme Court Opinion.

The opinion of the Supreme Court of Oklahoma appears record, pages 170 to 186, and is also found in, title *Magnolia Petroleum Company v. Price*, Vol. 86, Okla. Rep., page 105.

In the first paragraph the Supreme Court of the State construed the Act of Congress of March 3, 1891, 26 Stat. L. 1026, and held that this Act, nor any subsequent Act, gave a preference right to re-lease the public land of the Territory. Evidently the court overlooked the Act of May 4, 1894, 28 Stat. L., page 71, and the Secretary's Rules therein approved, in the writing of the first paragraph of the decision, although it is quoted in the body of the opinion. The Act of May 4, 1894, definitely says:

“And all of said lands and all of the school lands in said Territory may be leased under such laws and regulations as may be hereafter prescribed by the Legislature of said Territory, but until such legislative act the Governor, Secretary of the Territory and Superintendent of Public Instruction shall constitute a board for leasing of said lands, under the Rules and Regulations heretofore prescribed by the Secretary of the Interior. * * *”

The second paragraph of the syllabus holds that the only object of Congress was to preserve the

lands, or their proceeds, for the schools and public building purposes only, evidently overlooking the fact that Section 10 of the Enabling Act preserved to the lessee the preference right to buy.

Section 3 construed the rule adopted by the Secretary of the Interior under the Act of March 3, 1891, and held that it granted to the lessee only the right to lease in case the Territory chose to re-lease the lands.

The fourth paragraph holds that the legislation by the Enabling Act and the acceptance thereof by the Constitution constitutes a complete contract between the Government of the United States and the State of Oklahoma. In this we have agreed.

Sections 5, 6, 7, 8, and 9, construe the Enabling Act and holds that the State was not compelled to sell the lands and that Price could not compel the State to sell the lands. This was not our contention in the Supreme Court of the State and is not our contention here. Our contention is that the State has elected to sell the lands by the Act of March, 1909, Session Laws 1909, page 448. The Court seems to have confused the power of the Commissioners to determine whether or not the sale should be had and

the right of the Legislature of the State to so determine.

In the case at bar under the Sale Statutes the Legislature said sell the lands and uses the word shall, and to make it more positive they make it a penitentiary offense to fail to comply with the provisions of the Act. If the legislation is a contract as the State Court has held, then under the paragraphs just quoted the Commissioners have the power to repeal the statutes notwithstanding the mandatory order to the Commissioners to sell the lands, they can say, "We will not do so."

The 10th and 11th paragraphs hold that the lease to the Magnolia is valid and Price has no right to unreasonably interfere therewith. In the opinion the various sections of the Act of Congress are quoted as well as the provisions of the State Constitution. A mere reference is made to the Acts of 1907-1908, and 1909, 1910 and 1911 of the State Legislature regarding the leasing and sale of the land, but they are not quoted in the opinion. It is true that the Enabling Act uses the words "if sold," the preference should be given to the lessee, but nowhere in the Sale Act of 1909 is the expression "if

sold'' used. The mandatory order to the Commissioners is to sell the lands.

While the opinion of the Supreme Court does not state that the expression "if sold" should be read into the 1909 Sales Statute, yet the effect of the opinion is to write into the 1909 Sales Statute the provision *that if the Commissioners shall determine to sell the lands, the lessees shall have the preference right to buy.*

Section 1 of this Act says the Commissioners *shall* sell. While under the authorities previously quoted, we do not believe that the Legislature could delegate to the Commissioners the question as to whether or not they should sell the land. We do not have this question in this case. The Legislature has said sell. This Act of 1909 furnishes the *contract and compact between the lessee and the state.* In near the end of the opinion, record page 186, the court says:

"We have examined the various acts of Congress and all of the acts of Congress upon this question, including the Enabling Act, and have also examined and are reasonably familiar with the provisions of our State Constitution. We have also examined the various acts of the State Legislature with reference to the sale and leas-

ing of the public lands, and have examined the form, terms and conditions of the lease contract under which defendant in error, Price, claims, and are of the opinion that neither under the terms of his lease, the provisions of the statutes, the Constitution, nor the conditions of the Enabling Act, when applied to the facts in this case, is he entitled to the oil and gas therein, nor entitled to anything with reference to the oil and gas lease in question further than that prescribed by law, to wit: Any and all damages that he may sustain to his agricultural lease by reason of the operation of said oil and gas wells. If the drilling operations upon this land and the operation of the wells thereon have damaged him to any extent in the free exercise of his agricultural lease, he is entitled to such damages as he has sustained, but he is not entitled to the oil and gas nor the royalties from the wells, nor authorized to unduly interfere with the operations of same."

In this expression of the Court it will be noted that the Court included as binding the various provisions of the contract between the State and the lessee. They did not say that the contract complies with the law. The opinion cannot be read otherwise than to say that the Commisisoners were in the position to put any terms into the contract they desired and were not limited by any provisions of law.

A reading of the opinion will illustrate that the Court seemed to have construed the contract as if

between two private individuals, rather than the legislation enacted which involved grants and estates in the land. It is significant that in this long opinion not a single authority from any other court has been cited, this notwithstanding the fact that this case was thoroughly briefed before the Supreme Court of the State by counsel of respective sides, and thoroughly argued.

After this opinion was handed down the plaintiffs in error here filed their petition for a re-hearing, calling the Court's attention to the fact that that had overlooked many decisions (Record, page 187). This petition for re-hearing was overruled and this action was brought here by writ of error. It is apparent from this opinion that the State Court did construe the various Acts of Congress and did hold in effect that none of the constitutional provisions guaranteed to the plaintiffs in error by the Federal Constitution were violated. Plaintiffs in error contend that the court puts a wrong construction upon the various Acts of Congress; that the compact or contract between the Government and the State and Price was misconstrued; that the opinion violates the due process clause, impairment contract clause, and other clauses in the Federal Constitution.

Price claims the protection of the Federal Constitution and the Amendments thereto and the laws of the United States, because:

I.

(a) Congress reserved the lands by Act of March 3, 1891; 26 Stat. at L. 1043.

(b) The Act of May 4, 1894, 27 Stat. at L. 71, ratifies President's proclamation reserving section thirty-three (33).

(c) The Act of June 6, 1900, 31 Stat. at L. 680, reserves section thirty-three (33) in the Kiowa and Comanche reservation.

II.

The Secretary of Interior adopted Rules (record, pages 129 to 136) giving lessees preference right to release on March 20, 1891.

This preference right continued to be a property right.

Noel v. Barrett, 18 Okla. 304.

Clark v. Frazier (official volume not yet published), 177 Pac. 589.

III.

The preference right to buy was granted Price by Enabling Act, June 16, 1906, 34 Stat. at L. 267, Sec. 10, by Congress.

IV.

The State accepted the terms of the Enabling Act with its conditions, limitations, etc.,

By Sec. 8 of schedule of State Constitution ;

By Sec. 1 of Article II of State Constitution ;

By Sec. 4 of Article II of State Constitution.

The Acts of Congress and the sections of the Constitution of the State make the compact between the government and the state, and grants to Price the preference right to buy when sold.

V.

The State, acting through its Legislature, the only body authorized to act under the Enabling Act, did, on March 2, 1909, appearing Session Laws 1909, p. 448, directed and ordered the sale of section thirty-three (33), and made it a felony for any officer to wilfully violate the provisions of the Sales Statute and repealed all other statutes in conflict. This Act made a contract with Price which cannot be impaired.

VI.

Under these laws Price had :

1st. The preference right to re-lease.

2nd. After statehood the preference right to buy when sold.

3rd. After March 2, 1909, the absolute vested right to exercise the preference to buy and the Commissioners and their officials, not the State, have failed to sell.

4th. The right at all times to use and occupy the premises exclusively.

5th. These rights cannot be appropriated by a private concern for private purpose without Price's consent.

6th. They cannot be impaired.

7th. They cannot be taken away without due process of law.

The non-mineral character of the land was determined by the Board on March 25, 1909, by their approval (Record, pages 101-108) of the appraisal made on January 12, 1909 (Record, pages 98-100).

Price demanded that the lands be sold at a sale held in Stephens County, Oklahoma, in January, 1911 (Record, pages 101-102), and the agents refused.

He also demanded by letter of February 19, 1910 (Record, pages 148-149), that the land be sold with the rest.

The trial court found, paragraph 8 of the decree (Record, page 155), that Price has always been ready, willing, and able to comply with the law as to the purchase of the lands and that he demanded of the Commissioners the sale of said lands.

The trial court finds the lands were not mineral in character until after the commencement of this action (Record, page 155, paragraph 11 of the decree). Price has done all required of him by law. He has done all that he can. His preference right to buy the lands and all of it should be preserved. The Commissioners have failed to comply with the election of the state to sell said land. The judgment of the Supreme Court of the State of Oklahoma should be reversed and that of the trial court affirmed.

Respectfully submitted,

A. T. Boys,
Attorney for Plaintiffs in Error.

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Vol. 15 ST

In the Supreme Court of the United States

OCTOBER TERM, 1922

No. [REDACTED] ~~106~~ 14

**WILLIAM T. PRICE and ORA PRICE, Plaintiffs in
Error,**

vs.

**MAGNOLIA PETROLEUM COMPANY, a Joint Stock
Association; JOHN SEALY, E. R. BROWN, B.
WAVERLY SMITH, E. E. PLUMLY and W. C.
PROCTOR, Trustees; State of Oklahoma, Ex Rel.
Commissioners of the Land Office of the State of Ok-
lahoma, and Ex Rel. GEORGE F. SHORT, Attorney
General of the State of Oklahoma, Defendants in
Error.**

MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT

BRIEF AND ARGUMENT IN SUPPORT OF MOTION

Geo. F. SHORT,
Attorney General of Oklahoma.

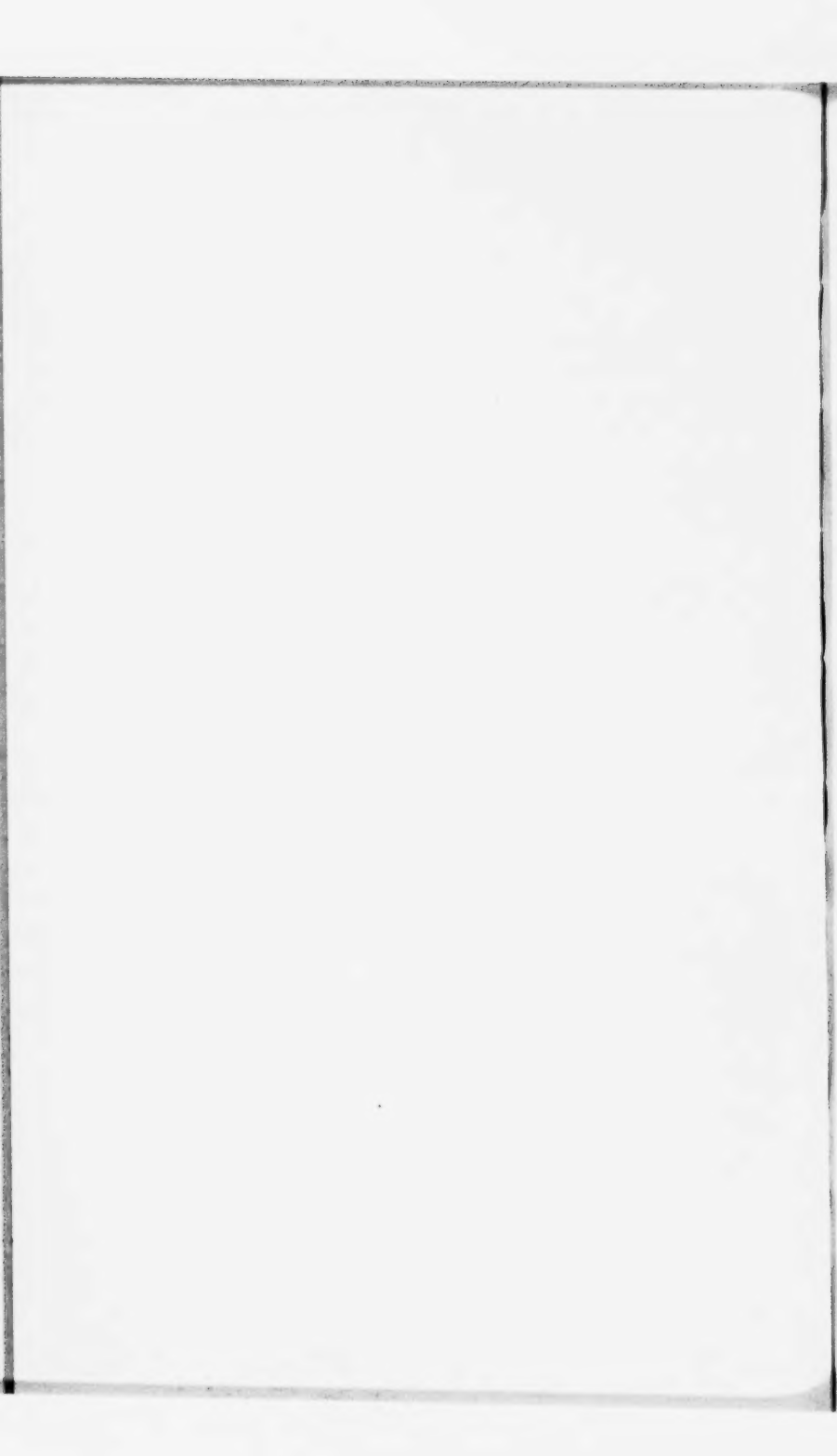
O. W. KING,
Asst. Atty., General.

Geo. E. MERRITT,
Attorney for the Commissioners of the Land Office.

W. H. FRANKE,
& B. B. BLAKENY,
Attorney and Solicitor for the Magnolia Petroleum Co.

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In the Supreme Court of the United States

OCTOBER TERM, 1922

No. 546

WILLIAM T. PRICE and ORA PRICE, *Plaintiffs in
Error,*

vs.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock
Association; JOHN SEALY, E. R. BROWN, R.
WAVERLY SMITH, E. E. PLUMLY and W. C.
PROCTOR, Trustees; State of Oklahoma, Ex Rel.
Commissioners of the Land Office of the State of Ok-
lahoma, and Ex Rel. GEORGE F. SHORT, Attorney
General of the State of Oklahoma, *Defendants in
Error.*

MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT

Now come the Magnolia Petroleum Company and its
Trustees, John Sealy, E. R. Brown, R. Waverly Smith,
E. E. Plumly and W. C. Proctor; and the State of Ok-
lahoma upon relation of the Commissioners of the Land

Office; and George F. Short, Attorney General of the State of Oklahoma, defendants in error and respondents, by B. B. Blakeney and George F. Short, Attorney General of Oklahoma, counsel for said defendants in error and respondents, and move to dismiss with costs writ of error and the appeal taken herein by the above named William T. Price and Ora Price, plaintiffs in error and to affirm the judgment upon the ground that this Court has no jurisdiction of the same and because the said writ of error and the said appeal is otherwise informal irregular and insufficient as shown upon the face of the record filed herein, and more particularly upon the grounds and for the reasons following, to-wit:

First: That on the 21st day of March A. D. 1922, as shown by the record in this Court, the Supreme Court of Oklahoma entered an order and judgment perpetually enjoining William T. Price and Ora Price from interfering with the operations of an oil and gas lease held by Magnolia Petroleum Company, and John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly and W. C. Proctor, its Trustees, and from interfering with the State of Oklahoma to the royalties under said lease for oil and gas produced as shown by the printed transcript of record at page 186, and that the said land so leased was the Northeast Quarter of Section Thirty-Three (33), Township One (1) South, Range Eight (8) West, in the State of Oklahoma, being a part of the lands granted to the State of Oklahoma under the provisions of the Act of Congress June 16, 1906, 34 Statutes at Large, pages 267. 273.

That the claim of the plaintiffs in error, that the said decision of the Supreme Court of the State of Oklahoma was in conflict with the provisions of the said Act of Congress of June 16, 1906, and with the Constitution of the

United States, Sec. 10, Art. 1, and amendment thereto, and that the State of Oklahoma by and through the provisions of its Statutes as construed by the said Supreme Court of Oklahoma, assume and seek to deprive the plaintiffs in error of property, title, and all rights, privileges and immunities secured to the citizens of the United States, and of said State, and deprive the plaintiffs in error of their liberty and property without due process of law, and attempting to deprive and deny the plaintiffs in error of equal protection of the laws and to impair the contract of the said plaintiffs in error as alleged in the assignments of error from one to twenty-three, inclusive, found in the record commencing at page 203 and continuing to page 213, inclusive, present no Federal questions because the said purported Federal question presented is purely fictitious, one devoid of merit, does not reasonably involve the validity of any provision of any Act of Congress or of any of the laws of said State of Oklahoma, or reasonably require or involve the construction of the Constitution of the United States or any of its amendments or any Act of Congress, and does not present any question, of which this court has jurisdiction.

Second: That the said contentions of the said plaintiffs in error fail to show that they have any reasonable claim or title to any property involved in said controversy which would authorize or justify them in presenting or raising any question involving the validity or construction of the Constitution of the United States or any Act of Congress, or in any wise presenting any Federal question to this Court.

WHEREFORE, the defendants in error and respondents pray this Honorable Court that the said proceeding and

writ of error be dismissed and the judgment of the Supreme Court of the State of Oklahoma Affirmed.

GEO. F. SHORT, C. W. KING and GEO. E. MERRITT,

*Attorneys and Counsel for the State of
Oklahoma.*

-- W. H. FRANCIS and B. B. BLAKENEY,
*Attorneys and Counsel for Magnolia
Petroleum Company.*

In the Supreme Court of the United States

OCTOBER TERM, 1922

No. 546

WILLIAM T. PRICE and ORA PRICE, *Plaintiffs in
Error,*

vs.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock
Association; JOHN SEALY, E. R. BROWN, R.
WAVERLY SMITH, E. E. PLUMLY and W. C.
PROCTOR, Trustees; State of Oklahoma, Ex Rel.
Commissioners of the Land Office of the State of Ok-
lahoma, and Ex Rel. GEORGE F. SHORT, Attorney
General of the State of Oklahoma, *Defendants in
Error.*

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

The motion to dismiss this appeal or writ of error involves an analysis of the decision of the Supreme Court of the State of Oklahoma and the Act of Congress June

16, 1906, 34 Statutes at Large, page 267, and the rights, title and interest of the plaintiffs in error to the lands in controversy. But little difficulty ought to be encountered from an analysis of the decision and the Acts of Congress in determining just the rights of the plaintiffs in error to the lands in controversy.

Sec. 8 of the Act of June 16, 1906, known as the Enabling Act, provides, among other things:

“That Section Thirty-Three and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation, and Act for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the Legislature of said State may prescribe.”

This section of course gave plenary power to the State, and any disposition of the land or any apportionment of its proceeds would be beyond the reviewing power of the Federal Government. This clause was followed, however, by the following additional legislation:

“Where any part of the lands granted by this Act to the State of Oklahoma are valuable for minerals, gas and oil, such lands shall not be sold by the State prior to January first nineteen hundred and fifteen; but the same may be leased for periods not exceeding five years by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require and the advertisement shall specify in each case a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which that shall properly belong, and no transfer or assignment of any lease

shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: Provided, however, that agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damages done to said agricultural lessees' interest therein by reason of such mining operations. The Legislature of the State may prescribe additional legislation governing such leases not in conflict herewith."

The above clause necessarily constitutes a limitation upon the power of the State of dispose of Sec. 33 prior to the first day of January, 1915, in case that any of such lands are valuable for minerals, gas, or oil. As no sale was made of this land prior to January 1, 1915, and no mineral lease was made under the provisions of the clause in Sec. 8, above quoted, the construction of this clause is therefore not involved, though we may later give an analysis of some of its provisions for the purpose of assisting in the construction of other sections of the Act.

Sec. 10, of the Enabling Act Provides:

"That said sections thirteen and thirty-three aforesaid, if sold, may be appraised and sold at public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods of not more than five years, under such rules and regulations as the Legislature shall prescribe, and until such time as the Legislature shall prescribe such rules these and all other lands granted to the State shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed but shall be reserved for designated purposes only, and until such time as the Legislature shall prescribe as aforesaid such lands shall be leased under exist-

ing rules: Provided. That before any of said land shall be sold, as provided in sections nine and ten of this Act, the said lands and improvements thereon shall be appraised by three disinterested appraisers, who shall be non-residents of the county wherein the land is situated, to be designated as the Legislature of said State shall prescribe, and the said appraisers shall make a true appraisalment of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereof at their fair and reasonable value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall, under such rules and regulations as the Legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements and to the State the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract at less than the appraisalment thereof shall be accepted."

An understanding of the provisions of this Act determines the rights of the parties to this controversy. This section provides that the State may at its pleasure sell section thirteen and thirty-three, but that if sold such land shall be appraised and sold at public sale in 160 acre tracts or less, under such rules and regulations as the Legislature of the said State may prescribe. Preference right to purchase at said sale is given to the lessee. There are other provisions in the section relating to the leasing of the land for a period not exceeding five year. This section also provides for appraisements both of the lands and of the improvements, and requires that in case the leaseholder does not purchase the land, that he shall receive payment for his improvements, and concludes with the provision that at said sale no bid for any tract less than the appraisalment thereof shall be accepted. The provisions of this section are so clear that ex-

tended refinements furnish no assistance to its interpretation.

Under these statutes the agricultural lessee is given no interest in the land and no title or vested right of any kind or character is given to the lessee. The State is not required to sell the land, and until the State sells it, the preference right to buy never comes into operation. The State is not required to lease it and the lessee is given no right to a lease upon the tract of land. The Act of Congress merely limits the right of the State in providing that if it is sold, it must be sold at public sale in tracts containing not more than 160 acres, for not less than the appraised value, and the lessee is given the preference right to buy at such sale. Or, if the State desires to lease the same it shall be leased for a period not exceeding five years under the rules and regulations to be prescribed by the State.

Thus we have four limitations upon the sale, if the State shall elect to sell; first, that if sold the sale must be at public sale; second, that the sale must be in tracts not exceeding 160 acres; third, that it must not be sold for less than the appraised value; and fourth, the lessee shall be given the preference right to buy. Until a sale is made, however, none of its provisions or limitations are made applicable. No sale having ever been made of the land in controversy, none of its limitations have ever come into operation, and no controversy can now be raised or presented as to the proper interpretation of them.

The next provision of Sec. 10, so far as applicable to any controversy now being presented, provides that the land shall be leased by the State under existing rules and regulations until other rules and regulations may be

adopted by the Legislature. The pertinent clause with reference to leasing is as follows:

“But such land may be leased for a period of not more than five years under such rules and regulations as the Legislature shall prescribe * * * but shall be reserved for designated purposes only, and until such time as the Legislature may prescribe as aforesaid, such lands shall be leased under existing rules.”

This clause gave the State permission to lease the lands and conferred upon the State the power to make any rule and regulation with reference to their leasing. It did not require that the same should be leased, and did not in any form restrict the power of the State to make any rule it desired with reference to leasing the same.

On the 2nd day of January, 1913, as shown by pages 20, 21, 22 and 23 of the record, the State of Oklahoma, by its Commissioners of the Land Office, executed an agricultural lease to W. T. Price for the tract of land in controversy, which provided that the State of Oklahoma, “hereby lease and let unto the party of the second part the following described tract of land.” This lease further provided: “This lease is made subject to the rights of the State of Oklahoma to sell and convey the land herein described at any time, and that upon such sale, if any be provided by law prior to the expiration of this lease, the same shall thereupon expire.” The lease also provided as follows:

“The said party of the second part hereby agrees, binds and obligates himself that he will not cut or remove, or permit to be cut or removed any timber from said land, that he will not quarry or remove, or permit to be quarried or removed, any building or valuable stone, from said land, that he will not mine or move or permit to be mined or moved any minerals therefrom, and that he will not

remove or take from said land any sand or gravel or other deposits of like character without first obtaining written authority so to do as by the laws of said state provided. The said party of the second part hereby agrees, binds and obligates, that he is leasing said land for agricultural and grazing purposes and that he will use and occupy the same for no other purposes and that he will care for and cultivate the same in a husbandlike manner and that he will protect said land from waste and that he will not permit or suffer any waste or trespass to be committed on or against said land."

This lease was extended by an extension certificate found at pages 24 and 25 of the record, and subsequently Price was permitted to hold over and enjoy the benefits granted by the lease. No reasonable contention can be raised that Price had or possessed any right, title, claim or interest in and to the tract of land in controversy except the right to use the said lands for agricultural and **grazing purposes** and the right to renew the lease in case the State desired to continue the leasing of the property. Whether or not the State had the right to lease the land for mineral purposes, and whether or not the provisions of the State law with reference to the leasing of lands for mineral purposes was regularly executed by the Commissioners of the Land Office, are matters that do not concern the plaintiffs in error, and does not justify an appeal to this Court.

If the State, exercising its power as a patentee of this land, did not desire to sell the same, the Acts of Congress in no way required such sale and attempted in no other manner to give to the lessee, Price, any right, claim or interest in the tract of land in controversy. The State might lease it, but whether or not the State did lease it was not a matter which concerned the Federal Government as a patentor, nor did the manner which the State

leased the land if for a term less than five years in any manner concern the Federal Government and the Legislative Acts authorizing the lease, and the manner in which said acts were executed is in no sense subject to the review of this Court as a Federal question.

The claim that Price having taken this land under an express contract that he should use and occupy the land for agricultural and grazing purposes, and for no other purposes, involves violation of the Constitution or its amendments, or the validity or construction of any Act of Congress, is utterly void of all merit and will not be considered in this Court. Price having no right to any mineral in the land could not in any way interfere with the rights of the owner of the land to enjoy the privilege of operating such mines, except so far as such operation might interfere with his agricultural and grazing lease. The Act of the Legislature expressly protected his agricultural and grazing interest, and the decision reserved to Price the full protection of such interest. In fact, assignment Number Seven, as well as other assignments, affirms the protection given by the decision for the damages done to the agricultural and leasing interests of Price, the lessee.

It is true that paragraphs eight and nine of the assignment of errors, intimate that the leasing of the land for mineral purposes was a sale of the land under the provisions of the Enabling Act. Paragraph eight (p. 206 of Rec.), so far as pertinent, reads as follows:

“The court erred in holding and deciding that the defendants in error (in the court below), William T. Price and Ora Price, had not the preference right to buy said land, in its entirety, under the grant of such right in and to said land so conditioned by the Act of Congress of June 16, 1906,” etc.

Paragraph nine alleges :

“The court erred in holding and deciding that the defendants below, William T. Price and Ora Price, defendants in error, had not the preference right to buy said land, and all thereof,” etc.

These assignments are so indefinite that they would probably be ignored. No contention was made in either of the lower courts that Price had the right to assert a preference right to a mineral lease, and it is probably not intended to be raised in this Court. The fair construction of the words, “in its entirety,” “and all thereof” found in these two assignments, is that having leased 160 acres he would at a sale be entitled to buy the whole of the 160 acres. We, however, have no objection to treating the assignments as covering the contention that Price had the right to purchase the mineral rights for the highest bid, because such contention is not presented by the record and is not reasonable under the interpretation of the Acts of Congress.

The State laws in providing the manner in which the preference right should be exercised required that the agricultural lessee, shall exercise his election to take such land at the highest bid immediately after the close of the sale, and that unless he did so elect he should forever be precluded from asserting any preference right to the land. (Sec. 7158 of Revised Laws of Okla., 1910). If it were admitted (which we expressly deny) that a mineral leasing was a sale in contemplation of Sec. 10 of the Enabling Act, Price would have to exercise that preference right, and not having exercised it would be held to have forever waived the same, and would now have no claim to the land. Price's answer does not claim that he has ever attempted to exercise his preference right or that he

now wants to exercise it, so far as the same affects the mineral lease.

The mineral lease was executed in 1919, after a public sale, in which the Magnolia Petroleum Company bid \$8,000 and at no place and at no time has Price ever attempted to exercise any preference right to acquire the mineral rights purchased by the Magnolia Petroleum Company. His contention has always been that he owned the land and that the State had no oil or gas to sell, and and that there was none for him to buy. Therefore, we might assert that if it is intended by these two assignments to claim a preference right to the mineral lease, there has been no attempt to exercise such preference right and now no claim can be made under such right.

However, Price had no preference right to take the mineral lease at the highest bid. The words, "if sold" and the terms found in Sec. 10, providing for the sale of the land, did not apply to the granting, assigning, conveying or leasing of the minerals in the land. The words, "if sold" and "when sold," found in this section referred to a sale of the fee of the land and not to the mineral leasing of the land. A mere inspection of the section and the application of legal principles to this section alone, would show that this is the proper view to be taken. But all question of doubt is removed by the consideration of the last paragraph of Sec. 8. This paragraph provides that the land shall not be sold, and then provides at some length that the same might be leased for mineral purposes, and thereby conclusively showing that the provisions authorizing or restricting the sale of the land in no way affected the right to lease or withhold the lease for mineral purposes.

Kennamer v. Midland Oil & Drilling Co.,
(CCA) 229 Fed. 872.

The effect of this paragraph is to make a severance of the oil and gas rights from the surface or corpus of the land.

There has been no serious contention on behalf of the plaintiffs in error that these acts of Congress gave any title to the land in controversy to the lessee. An examination of the opinion of the Supreme Court of the State and the several Acts of Congress referred to in this opinion, conclusively show that the absolute fee simple title became vested in the State. An analysis of these several Acts is found commencing at page 175 of the record. The Court has placed in italics in this opinion, the clause found in the Organic Act creating the Territory of Oklahoma, being Sec. 18 of the Act of Congress approved May 2, 1890, 26 Stat. L. p. 81, which is as follows: (See Rec. page 175.)

"Are hereby reserved for the purpose of being applied to public schools in the state or states hereafter to be erected out of the same."

The same idea was carried through all of the subsequent grants. The Supreme Court of the State in discussing the provisions of Sec. 10 of the Enabling Act, which permitted a sale by the State of Sections Thirteen and Thirty-Three, speak as follows:

"But said grant provided that such lands, 'if sold,' should extend a preference right to the lessee in possession, 'at the time of the sale,' to purchase at the highest bid. This is the only obligation imposed on the State as to the sale, except that under the proviso in section ten, if such lands should be sold at all, then the lands and improvements should be appraised in a certain manner, and the very fact that said section provides that in case the lessee does not become the purchaser, he shall be

paid the appraised value of his improvements, shows that Congress had no thought of granting to the lessee the absolute right to purchase, a right which he could enforce against the State whether the State chose to sell the land or not."

Further on in the opinion the Supreme Court of Oklahoma stated:

"The State now has complete control of such lands to lease or not to lease if it so chooses; to sell or not to sell if it so chooses. Should it sell any of them or lease any of them, such sale or lease must not violate the conditions of the grant."

The remainder of the opinion by the Court deals with the rights of the lessee under the laws of the State. It is held that under the laws of the State the Commissioners of the Land office ought not to have sold the property; that the Commissioners of the Land Office had properly segregated it as provided by the laws of the State. Whether the Court was right in this construction is not a question open in this Court. It was merely a construction of the different provisions of the Acts of the Legislature of Oklahoma, and the construction so given will be accepted as conclusive in the Federal Courts. This construction, however, is so obvious that but little can be gainsaid.

We then have a construction of the Act of Congress which places the fee title in the State of all the lands embraced by the several grants of Congress, with the privilege of selling certain portion of the land prior to January 1, 1915, and all of the lands after January 1, 1915. Or, a prohibition of the sale of any and all of said lands that were mineral in character but with the right to lease the mineral lands prior to January 1, 1915, in a particular designated manner, and a leasing of all of

the lands after January 1, 1915, in any form which the State might desire, subject to the condition that a lease for agricultural purpose should be for a period not exceeding five years. A lease of the tract of land to the plaintiffs in error for agricultural and grazing purposes, with the reservation of the right to mine the same, gives to these plaintiffs in error no right to inquire into the question of whether or not the State properly administered its estate in the minerals.

Provisions having been amply made to reimburse the agricultural lessee for the damage to his agricultural lease, he was not concerned as to the manner of disposal of the mining interest. He could raise no question, either Federal or State, regarding the disposition of the mining interest. His rights are so obviously restricted to the agricultural interest, that his attempt to raise a question regarding the disposition of the mineral interest is wholly without merit.

The plaintiffs in error did in the court below, present at great length their contention that the agricultural lessee had in equity become vested with the title because the officers of the State had not put the land up for sale and had erroneously attempted to segregate it. In his assignments of error he carries out this view by copying and italicising the expression that the Commissioners, "duly segregated such land in question from sale because of the oil and gas *supposed* to exist therein," and then alleges that the laws of Oklahoma, "did not confer plenary power or authorize segregation of said land on 'supposition,' and did not authorize the arbitrary and whimsical discrimination practiced against defendants in error; and because the said statutes of Oklahoma did not provide for a hearing to determine whether or not the lands of defendants in error was mineral

lands or 'supposed' to contain mineral within the contemplation of said Statute."

The above excerpts are found in Assignment Fourteen, pages 208 and 209 of the record. The State Court, however, held that the law did grant to the Commissioners of the Land Office the authority, and made it their duty to segregate the land when they had reason to believe the same valuable for mineral, and that if they supposed or believed it valuable, that they would have been guilty of the violation of their duties if they neglected to so segregate. These, however, are constructions of the State law, and the decision of the Supreme Court of the State is final. Whether the State properly segregated the land or not, is immaterial to Price because Price had no interest in the land. The Supreme Court of the State (p. 185 of Rec.) used this language:

"But the State has not sold it and the lessee has not purchased it, and until the land is sold and purchased by the lessee and fee simple title conveyed to the lessee, such lessee has no right to the oil and gas or other minerals therein."

A clear statement of the issues in controversy may be made as follows: The Act of Congress gave the title to the State and permitted the lessee in possession at the time of the sale to take the land at the highest bid. The State never sold the land and the lessee never took any interest in the land. The State could not give it to the lessee without a public sale because the Act of Congress required that the land should be sold at public sale for not less than the appraised value, and the State was without power to in any way give any of the title to Price without such a sale. Price, however, says that the State ought to have sold the land and therefore he has title notwithstanding the Act of Congress says the state

cannot give the title without a public sale. His complaint, therefore, is directed not at the violation of any Act of Congress, but the violation of the duty which he claims was imposed by the laws of the State. The Supreme Court of the State has decided that there was no violation of any of the laws of the State and no duty imposed to sell on the officers in charge of the public lands. Therefore, no Federal question can in any sense be presented.

We think the question might be disposed of by this discussion, but we will examine the assignments of error further for the purpose of ascertaining whether the decision of the Court in this case in any way deprived the plaintiffs in error of their liberty and property without due process of law and without compensation as referred to in a part of such assignments, and particularly Assignments Sixteen and Seventeen.

The method by which Price has attempted to urge his claim to a vested right is rather attenuated. He claims that under the provisions of paragraph eight of the rules originally issued (Rec. p. 134), he became vested with some interest in the land. This provision reads as follows:

“In case a new lease is to be made at the end of the third year, the preference shall be given the former lessee, if the Governor finds that he cultivated the land in a business-like manner and fulfilled the term of the lease in good faith.”

This rule, in principle, was carried through the Legislation of the State and was practically the rule governing the leasing of property for agricultural purposes at the time this land was leased to Price.

To assert, however, that this provision would give

a vested right, would make a vested right or interest an intangible or flimsy thing. In the first place, the rule provides that *in case a new lease is to be made the preference shall be given to the former lessee*. The State was not required to make the lease and therefore the lessee was not entitled absolutely to such lease. In addition it provided that it should not be made to the lessee unless the Governor should find that he had cultivated the land in a business-like manner and fulfilled the terms of the lease in good faith. There is no pretense in this case that the Governor made any such findings, or that he had in good faith fulfilled the terms of the lease. We do not, however, desire to enter into any controversy regarding the facts because under no possible theory could it be contended that he was entitled to any vested interest, when the very provision giving the right to release authorized the divesting of such interest by merely refusing to lease.

Sec. 7195 of Rev. Laws of Okla. 1910, provides expressly that the land should be segregated if the Commissioners deemed the same valuable for oil and gas, and that such finding that the same was valuable should be entered of record, and then stating, "and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this article."

Sec. 7196 of the said Rev. Laws of 1910, reads as follows:

"Each agricultural, timber, grazing or other lease to any surface interest in land in which the deposits are segregated, as provided in the preceding section, shall reserve to the State, its lessees or grantees the right to drill and operate oil and gas wells on such premises, and the easement, use and

right of way to enter upon and fully enjoy the mining right reserved in this article."

These sections, therefore, are within the terms of the original rule, that the State might not release the lands, or if it did it might attach special conditions to such leases. It did attach the condition in Sec. 7196 that such lease should reserve to the State and its lessees or grantees the right to drill and operate oil and gas wells on such premises, and the easement, use and right of way to enter upon and fully enjoy the mining rights reserved by the law. And the legislature did withhold it from leasing on any other terms.

Sec. 7200 of the Statutes provides for the payment of damages, which the agricultural lessee might suffer, and these rights were fully guarded by the decision of the Oklahoma Supreme Court in this case. It could not be reasonably contended that the lessee had any vested right, and the decision of the Court in merely defining his right, would not be in any way divesting him of any vested right. If he had no vested right to the land the Court by its decision of course would not divest him of a vested right. If the lessee had only the right to compensation for the injury to his surface lease and the Court preserved him this right, then he can in no sense complain. Under such conditions these assignments do not present any Federal question.

In the case of *Frisbie vs. Whitney*, 9 Wall. (76 U. S.) 187; 19 L. Ed. 68, the Court held that a claim to public land which did not rise to the dignity of a vested interest could not affect the right of Congress to dispose of the public domain. Justice Miller uses this language in the opinion:

“On the other hand, it will hardly be contended that anything short of a vested right in this land could deprive Congress of the right which it has as owner and holder of the legal title, and, by the express language of the situation, to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.”

In the case of *Rector vs. Ashley*, 6 Wall. (73 U. S.) 142, this Court emphasized the principle that until the title of the claimant became a full vested legal title that Congress had the power to make any disposition of the land it saw fit. Both of these last cited cases are interesting because it is held that a claimant of land can only assert an interest to the land by virtue of some provision of the law, and that the acts of such claimant in themselves confer no right upon the claimant.

In the case of *Hutchings vs. Lowe, et al.* 15 Wall. (82 U. S.) 77; 21 L. Ed. 82, all the earlier cases were reviewed. Justice Field writing the opinion of the case held, that no title ever passed to the claimant of public lands until some law had been passed permitting a sale of the land, and some acts done which constituted a purchase of the lands. After asserting that a preference right to buy gave no vested right, because there could be no assurance that the claimant would exercise this preference right and pay in the money and there being no way to compel him to exercise such preference right and make the required payment said:

“The Court cannot assume, and then found a decree upon the truth of the assumption, that the defendant would have complied with the provisions of the pre-emption laws, had Congress never made the grant. Nor could it make any such assumption even if it were held that those laws surrendered unconditionally the entire public lands to settlers, in-

stead of allowing to them the privilege of pre-emption provided the lands are offered for sale in the usual manner."

The Court further stated in discussing the claim of counsel, that a preference right constituted a vested interest, as follows:

"The whole difficulty in the argument of defendant's counsel arises from his confounding his distinction made in all the cases whenever necessary for their decision, between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States; and the acquisition by him of a legal right as against other parties to be preferred in its purchase, when the United States have determined to sell."

While there is much fog created in the specious claims of plaintiffs in error, with slight straining of the vision we can see clearly that no real grounds exist for federal review. Price's interest is limited by law and contract to a use of the surface for agricultural and grazing purposes, and the payment to him for the injury to the surface is a full protection of that right. The laws of the State providing for segregation, or the manner of the segregation of the land from sale, did not affect his surface interest and therefore divested him of no vested interest and effected no contract which he had. As said by Judge Peckham in the case of *New Orleans Water Works Co. vs. Louisiana Sugar Refg. Co.*, 185 U. S. 336, 344:

"It has long been the holding of this Court that in order to warrant the exercise of jurisdiction over the judgments of state courts, there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a charac-

ter that its mere mention does not show it destitute of merit: there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up."

In the case of *New Orleans vs. New Orleans Water Works Co.*, 142 U. S. 79, referring to the averment in the Federal question, it is stated:

"It must not be wholly without foundation. There must be at least color or ground for such averment, otherwise a Federal question might be set up almost in any case, and the jurisdiction of this court invoked simply for the purpose of delay."

In *St. Joseph & G. I. R. Co. vs. Steele*, 167 U. S. 659, it is stated:

"Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real, substantive question, on which the case may be made to turn."

We, therefore, insist that the appeal presents no bona fide Federal question and no reasonable grounds for appealing the case to this Court, and that it ought to be dismissed and the judgment affirmed.

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W. H. FRANCIS,
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Attorney and Solicitor for the Magnolia Petroleum Co.

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U. S. DISTRICT COURT

In Fee
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1911

No. 100-14

WILLIAM T. PRICE ET AL. PLAINTIFFS IN ERROR

vs.

MAGNOLIA PETROLEUM CO. ET AL.

WRIT FOR HABEAS CORPUS IN ERROR

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C. W. KING,
Assistant Attorney General

GEORGE H. BROWN,
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 106.

WILLIAM T. PRICE AND ORA PRICE, PLAINTIFFS IN
ERROR,

VS.

MAGNOLIA PETROLEUM COMPANY, A JOINT
STOCK ASSOCIATION; JOHN SEALY, E. R. BROWN,
R. WAVERLY SMITH, E. E. PLUMLY, AND W. C.
PROCTOR. TRUSTEES; STATE OF OKLAHOMA *ex*
Rel. COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA AND *ex Rel.* S.
P. FREELING, ATTORNEY GENERAL OF THE STATE
OF OKLAHOMA, DEFENDANTS IN ERROR.

Brief For Defendants in Error

Plaintiffs in error have filed two briefs, one of which was signed by Judge J. F. Sharp and others, and one signed by Judge A. T. Boys alone. We will designate the briefs in our argument as "Sharp Brief" or "Boys Brief" respectively.

The statement of the case made by the plain-

tiffs in error is substantially correct, though portions of such statement are incomplete.

The record in this case, commencing at page 26, contains an agricultural lease which forms the basis of the rights of the plaintiffs in error. This agricultural lease is dated the 2d day of January, 1913, and runs for a period of two years. The granting clause in this lease provided that the premises were leased and let to William T. Price, to have and to hold the same for a period of two years from the 1st day of January, 1913, to and including the 31st day of December, 1914, provided, however:

"This lease is made subject to the rights of the State of Oklahoma to sell and convey the land herein described at any time, and that upon such sale, if any be provided by law prior to the existence of this lease, the same shall thereupon expire *and the party of the second part shall, as the lessee, be entitled to same at the highest bid,* subject to such conditions, limitations, restrictions, and exceptions as may be provided by law."

The italicised words, "and the party of the second part shall, as the lessee, be entitled to same at the highest bid," are erased by a red ink line being drawn through the same. This lease further provided that the

"said party of the second part hereby agrees, binds and obligates himself * * * that he will not mine or move, or permit to be mined or moved any mineral therefrom * * * the said party of the second part hereby agrees, binds, and obligates that he is leasing said land for agricul-

tural and grazing purposes; and that he will use and occupy the same for no other purpose."

On pages 30 to 32 of the printed record is found an extension certificate signed by Commissioners of Land Office and W. T. Price in which appears the following clause:

"Such extension being made subject to all laws of the State of Oklahoma, which are now or may hereafter be in force and effect, and which may hereafter be passed,"

and providing in such extension that the same expired on the 31st day of December, 1915. It appears from the record that Price continued to hold said property in the sense of a tenant holding over, without any further contract with the State of Oklahoma.

On the 26th day of August, 1915, an order was entered by the Commissioners of the Land Office of the State of Oklahoma segregating the land in controversy for mineral purposes, a copy of which order is found on pages 117 and 118 of the record. We call special attention to the following in the segregation order:

"After discussion by the Board it was thereupon moved by Mr. Lyon and seconded by Mr. Howard that the above sections and quarter sections be declared valuable for mineral purposes, and that the same be segregated and withheld from sale.

"All voted "aye" motion prevailed."

There are other matters material to this contro-

versy which we will refer to in the various subdivisions of our argument.

No Federal Question Presented.

We filed a motion to dismiss the appeal taken in this case upon two grounds: first, that no *bona fide* Federal question was presented; and, second, that the plaintiffs in error did not plead any fact showing any title in themselves, and were therefore precluded from raising any Federal question. These propositions seem to be obvious. The plaintiffs in error have filed complicated briefs, but everywhere it is apparent: first, that Price has no claim under any Federal Act; and, second, that it is immaterial to him whether the acts of the Legislature are valid or invalid. We do not care to enter into an extended discussion that the right to appeal cannot be prevented by the decision of the State court upon a non-Federal question, if a determinative Federal question is properly involved, because in the case at bar Price asserts his claim to the property under State statutes and the Supreme Court of the State, in the decision rendered, held that these State statutes gave Price no rights to the land. The question might be briefly stated as follows: The act of Congress, known as the Enabling Act, for Oklahoma, 34 Stat. L., 267, passed and approved June 16, 1906, gave section 33 to the State of Oklahoma for public buildings' purposes. Section 10 of this act, which is copied in Sharp's brief on pages 2 and 3, provided:

"That said sections thirteen and thirty-three aforesaid, if sold, may be appraised and sold at

public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale."

Other provisions appear regulating the leasing of the land and the appraisalment of the improvements of the lessee. Nothing in this section required that the State should sell the land, and when we follow plaintiffs through the labyrinth of refinement drawn in their brief we find that their claim rests on statutes of Oklahoma which plaintiffs claim authorized a sale.

At pages 29 and 30 of Sharp's brief, plaintiffs state the contentions of the several parties, and say under the third subdivision:

"That the State may sell said land:

(a) Under such rules and regulations as the Legislature may prescribe.

(b) Preference right to purchase at the highest bid being given to the lessee."

This discloses the theory of counsel that the State was not required to sell, and that the preference right to purchase being given to the lessee, can only arise *at the time of the sale*. It is alleged in the pleadings and restated frequently in the briefs that no sale was had, and it would then seem to follow that no preference right to purchase could have come into operation.

The controversy seems to arise, if we are capable of understanding counsel, because of the assumed con-

flict between two or more acts of the legislature. The Legislature of Oklahoma first provided, as it appears on page 6 of Sharp's brief, that "where such lands are by said Commissioners deemed valuable for oil and gas, such Commissioners shall enter of record in their office their finding, declaring that such oil or gas character exists, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this act."

Counsel contend: first, that this act was in conflict with the act passed March 2, 1909, requiring the Commissioners to dispose of sections 13 and 33, and also in conflict with the proviso of section 1 of that act, which provides:

"Provided, further, That where any part of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said land should not be sold prior to January 1, 1915."

The plaintiffs must rest their case upon the proposition that the State of Oklahoma had ordered the property sold, before they can build up their attenuated theory that because it was not sold they acquired some rights. These two acts of the Legislature came to the Supreme Court of the State, and it was there decided that there was not a conflict, and that the Statute passed and approved May 26, 1908, commencing at page 6 of Sharp's brief, was continued in force and governed

and controlled the action of the Commissioners of the Land Office in this matter.

The decision of the Supreme Court is found in 86 Okla., commencing at page 105, and at page 112, it is stated:

"Article 3, Chapter 69 of R. L. 1910, authorizes the Commissioners of the Land Office to segregate oil, gas and other mineral lands, and to reserve the rights of the State to all oil, gas and other mineral lands from the surface lessees."

If it be conceded that the Act of Congress did not require a sale of the land, then it must follow that we must look to the laws of the State to determine whether a sale has been authorized. The decision of the Supreme Court expressly holds that the State was not obligated to sell this land. It is stated in the opinion:

"The only rights he (Price) had were those defined by the laws of the State, which rights, as defined both by the laws and by his lease contract, are no more than the preference right to re-lease such land for agricultural purposes at the expiration of his lease, if the State elects to re-lease it, and the right to purchase same when sold by the State, if the State should sell it. He has no right, under the law or under his lease contract, to force the state to sell such lands until the State elects so to do."

It cannot be contended that the State court was deciding this case upon Non-Federal questions to defeat the jurisdiction of the Federal tribunals, because Price was claiming that under these State laws he was entitled to have this land sold, and was entitled to ob-

tain title thereunder. When the State Supreme Court held that the State was not required to sell, and that he (Price) could not buy, under the laws of the State, the court was merely answering the contentions which he made. When the State court held that the land could not be sold under the State Statutes, Price obtained no title and it became immaterial to him whether some of their provisions were in conflict with the provisions of the Enabling Act. However, there was no conflict,—the Enabling Act said the State might keep or sell these lands, and the Supreme Court held, in construing the acts of the Legislature, that the State had kept this particular land.

It would seem to us clearly unsound for Price to assert that, under the laws of the State, he was entitled to buy this land; and, when the Supreme Court construed these laws, and held that he was not entitled to buy it, for him to say he was deprived of some right or privilege under the Federal Constitution. His whole right is predicated upon the laws of the State. He assumed that under the laws of the State, the State officials should have sold the land, and then asserts that because they did not sell it they deprived him of some preferential right.

We think the conclusion is undoubted that if the State law did not require a sale, he is deprived of nothing, but still has the preferential right and will be fully protected in it when the property is sold, if he is then the tenant in possession.

It is rather apparent, when the plaintiff's claim

is sifted down, that he is contending that he owns this land, not under the provisions of the Act of Congress, but contrary to its provisions. The Enabling Act expressly provided that the lands should be advertised for a certain period of time and should be offered at public sale, and that the highest bid therefor should be obtained, and that Price might then elect to take the land at the highest bid. He now contends that the land was not advertised and was not sold, and that no highest bid was obtained, but that his preference right is superior to all these provisions and gives him the right to take the land at the appraised value.

The Legislature could not authorize the passing of title from the State to Price, and no court could enter a decree to pass this title to Price contrary to the provisions of the Enabling Act, which directed the advertisement of a public sale and the procurement of the highest bid therefor. So that if all the contentions of Price are true, that the State directed a sale and the officers did refuse to make such sale, he still can assert no rights under any act of Congress because he does not pretend that any sale was made, or any sale was advertised, or that any highest bid has ever been procured, or that he has any way of knowing what the highest bid would have been, and whether or not he would have taken the land at such high bid.

Price founds his claim upon so many presumptions which, from the nature of things, it is impossible to determine, and all of which are contrary to the express language of the act of Congress. If this land had been offered for sale, can it be determined what would have

been the highest bid, or can it be determined that Price would either have had the disposition or the ability of accepting this land at the highest bid? But whatever is the conclusion to be drawn from this claim of Price, it is obvious that he bases his title upon the laws of the State authorizing a sale. The State Supreme Court could decide that question, and this court cannot without construing the laws of the State.

In the recent case cited by plaintiffs, *Ward vs. Love County*, 253 U. S., 17, this court expressly said:

"We accept so much of the Supreme Court's decision as held, that, if the payment was voluntary the money could not be recovered back in the absence of the permissive statute, and that there were no such statute."

The court would in this case undoubtedly hold that, when the Supreme Court of the State held that under the laws of the State the Commissioners of the Land Office were authorized to segregate this land, and that such order of segregation prevented the Commissioners from selling the same, such was the law of the State of Oklahoma. The decision of the State court was not made for the purpose of evading the Federal jurisdiction, but it was applying and construing the State laws presented by Price.

Counsel in their argument, Sharp's brief, commencing at page 64, state as follows:

"To use and apply the language in *Buxton vs. Traver*, 130 U. S., 232; 32 L. Ed., 920, the State, by this statute, made the lessee a 'promise to sell

him his home on those terms, entered into a contract with him on the subject'."

The Legislature had not made any promise to sell Price any home, but, upon the other hand, enacted a law, of which he had full knowledge, that it would not sell at any time any of the lands valuable for mineral.

The case of *Pennoyer vs. McConnaughy*, 140 U. S., 1; 35 L. Ed., 363, relied upon by counsel, when properly explained, is an authority against their contention. The State of Oregon had passed an act providing for the disposition of certain swamp lands. While this act was in force, Henry C. Owens made application to purchase a portion of the said lands and paid to the Board of Commissioners the twenty (20%) per centum provided by law on the purchase price of the land. The land was transferred subject to the payment of the balance of the money. The Legislature of Oregon passed a law providing that where the payment had not been made the land should revert to the State. The Board authorized to determine the land controversies in the State of Oregon had held that the applicant had complied with the law, and that though the money had not actually been paid, until the law was changed, that the nonpayment of money was due to the fact that no proper survey had been made. The court thereupon, in construing the act of the Legislature referred to, said:

"The powers and duties of the Board of Commissioners were defined by the Supreme Court of the State in the following language: 'This Board was created by the State Constitution and by it

invested with the power to dispose of these State lands, and its powers and duties are such as are provided by law. It is composed of the Governor, Secretary of State and State Treasurer, and is a part of the administrative department of the Government, and exercises its powers independent of the judiciary department, and its decisions are not subject to be reversed by the court. It occupies in this State the same relation to the State judiciary as the Land Department of the United States does to the United States courts, and their decisions have not been the subject of review by the United States courts.'

"The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect."

The case states the law which we think is controlling in this case—that where the Board of Commissioners had authorized the sale of the property and had made the sale, though the payment was not actually made, but the party was ready to make the payment, and it was subsequently made and accepted, a vested right would result. Upon the other hand, where the Board had by resolution segregated the land and directed that the same should not be sold, we think it

is equally clear that a sale could not be made, and the construction of the Board would be followed by the court and its action upheld. Justice Lamar in *Pennoyer vs. McConnaughy*, stated the rule that is now everywhere recognized, that the construction given to the law by the officers authorized to execute it would if reasonable be followed by the court, but he reaffirmed the rule stated in the Yosemite Valley case, which he cites with approval.

The Supreme Court of Oklahoma has construed the statutes involved in this case. It is held that the statute authorizing the Commissioners of the Land Office to segregate lands deemed valuable for oil and gas is valid. It construed the statute ordering a sale of a part of the school land and held that such statute did not require the Commissioners of the Land Office to sell land which they deemed valuable for oil and gas. Having interpreted these statutes, and construed them, and having held them valid, such construction by the Supreme Court of Oklahoma will be accepted in this court.

The construction of the statutes by the Supreme Court of Oklahoma will not only be followed by this court, but such construction will be regarded as a part of the provisions of the act, when this court is called upon to determine whether it violates any right secured by the Federal Constitution.

In the case of *Joseph M. Douglass vs. Pike County, Missouri*, 101 U. S., 678, Mr. Chief Justice Waite, in the first syllabus stated the law to be as follows:

"This court treats the construction which the

highest court of a State has given to a statute of the State as a part of the statute."

Mr. Justice Van Deventer, in the case of *Lindsley vs. Natural Carbonic Gas Company*, 220 U. S., 61, at page 73 announced the same rule in the following language:

"Coming to the provisions in question, it is necessary to inquire what construction has been put upon it by the highest court of the State, for that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provisions when they are called upon to determine whether it violates any right secured by the Federal Constitution."

Weightman vs. Clark, 103 U. S., 256, 260.

Morley vs. Lake Shore & M. S. R. Co., 146

U. S., 162, 166.

Olsen vs. Smith, 195 U. S. 332, 342.

At page 68 of Sharp's brief they quote from the act approved March 2, 1909, which is attached to their brief as "Appendix C," the following:

"The Commissioners shall dispose of, sell, and convey, subject to the limitations, exceptions, conditions, rules and regulations and instructions, as provided in the Enabling Act," etc.

It is then asserted that the Legislature regarded only "limitations, conditions, rules and regulations and instructions of the *Enabling Act*." This, of course, was an error and the quotation is inaccurate. The act reads as follows:

"The Commissioners of the Land Office shall

dispose of, sell, and convey, subject to said limitations, exceptions, conditions, rules, regulations and instructions, as provided in the Enabling Act, in this act, or in any act amendatory hereof, except where same is embraced in any reservation specifically reserved from sale in this act, or in any act of Congress, or in any act of the State, specially reserving any part thereof for any special purpose."

This clause recognized the act of the legislature previously passed and approved May 26, 1908, which provided that the Commissioners should reserve all lands deemed to be valuable for mineral, which act is found in Sharp's brief as "Appendix B." The proviso found in section 1 of the Sale statute, marked as "Appendix C," which stated that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of such land shall not be sold prior to January 1, 1915, was inserted to meet the requirement found in section 8 of the Enabling Act. The word, "known" as used in this proviso, was not intended in any sense to change the Segregation statute marked as "Appendix B," and the words in the statute which "except from sale lands reserved from sale in that act, or in any act of Congress, or any act of the State," referred to the only two exceptions then existing: first, the exceptions noted in section 8 of the Enabling Act, and, second, the exceptions noted in the act of May 26, 1908, the Segregation Act, designated as "Appendix B" in Sharp's brief.

The record discloses the following facts: That

on the 8th day of June, 1902, a lease was executed to the land in controversy to William T. Click for a term commencing the first day of January, 1902, and expiring the first day of January, 1905. This lease appears in the record commencing at page 47. On the first day of January, 1905, this lease was renewed for the full term of three years, which appears on page 51 of the record. This lease would therefore expire on the first day of January, 1909.

It appears that appraisers were sent out under the laws of the State into the different counties of the State and different appraisers were required for the different counties because of the provision that an appraiser should not be selected from any county in which the property to be appraised was situated. It appears from the record that the blank that was taken out by the appraisers to appraise this land, and which is included in the record at page 146, showed that the lessee was William T. Click, whose post-office address was Comanche, but that the appraisers found the family of William T. Price in possession of the property and evidently wrote the name of William T. Price in front and on the margin of the appraisement blank as the same appears at page 140 of the record.

The fact that Price's name was written on the margin and in front of the word "lessee", is disclosed from the second appraisement which was in the same form and is found on page 146 of the record. At the top of the appraisement appeared the description of the land and then followed the word

"lessee", then the name of the lessee of record was inserted in the blank. At the time of the preparation of the blank, William T. Click was the owner of this land. Mr. Price testified at page 137 that his family was on the land but that he was absent at the time the appraisers visited the land.

At page 55 of the record is Exhibit "D", and attached to the answer of the plaintiff in error is the assignment from Click to DeArman. This assignment is dated the 31st of December, 1908. This assignment, however, was undoubtedly filed after the 31st of December, 1908, in the Capitol at Guthrie, and the appraisers were at the time in Stephens County, many miles from the Capitol, with blanks that had been previously prepared, and this appraisal was made afterwards, to-wit, January 2, 1909. They, therefore, amended the blank by inserting Price's name upon the margin preceding the word "lessee".

But as a matter of fact no assignment had been made to Price, and on May 12, 1909, the records of the Land Office at the Capitol showed that the title of the lease was still in DeArman (Rec. p. 130), where it will be noted that on May 12, 1909, the Commissioners of the Land Office issued an extension agreement of the lease to DeArman, and that this extension extended the lease until the 31st of December, 1909, but it was assented to by DeArman on the 17th day of June, 1909, (See Rec. p. 131).

It does appear, however, that on the 15th day

of October, 1909, (Rec. p. 138), that W. T. Price procured from DeArman an assignment, and he testifies that he sent the same to the Land Office, but there is no evidence that the interest of Price became recorded until he obtained a lease therefor.

On the 2nd day of January, 1913, William T. Price procured a lease of this tract of land for a term of two years, which lease appears at pages 26 to 30 of the record. This lease was subsequently extended, as appears at page 132 of the record, by agreement of March 6, 1915, which was accepted by Price, and extended the lease from the 1st of January, 1915, to 31st of December, 1915.

The appraisalment was ordered by the Act of the Legislature passed April 8, 1908. The second section of Article 2, Chapter 49 of the 1907 and 1908 Session Laws, authorized the appraisalment. At the time this appraisalment was authorized there was no provision for the sale of the property. On the 2nd of March, 1909, the statute which is called by plaintiffs the "Sale Statute," was passed by the Legislature of Oklahoma and provided that a sale should be made under the appraisalment of 1908. Section 4 of the Sale Statute provided as follows:

"Said lands and improvements thereon shall be sold under the appraisalment of the year 1908, made and returned to the Commissioners of the Land Office; Provided, that in the event it shall appear the said land or improvements have not been properly appraised, the Commissioners of the Land Office shall have the

power to order and provide for a new appraisalment; Provided, further, the Commisisoners of the Land Office shall notify the lessee before such land is offered for sale of the appraised value of his improvements and should any such lessee be dissatisfied with the appraised value of his improvements, said lessee shall within thirty days from notice thereof, notify the Commissioners of the Land Office in writing; whereupon the land covered by said lessee's contract shall be reserved from sale, pending a review of the appraisalment made by the said Commissioners of the Land Office in the District Court of the County in which said land is located. An appeal from the Board of Appraisers may be taken as provided in 'An Act amending Section 28, Article 9, Chapter 17. of the Statutes of Oklahoma, 1893, and regulating the method of procedure in the condemnation of private property for both public and private uses,' approved May 20, 1908; and the procedure of such appeal and the review and demand for jury trial in said court shall conform to the procedure therein set forth; and pending the termination of said appeal the lessee shall be entitled to remain in possession of said property, paying therefor as rental five per centum of the appraised value of said land upon which said improvements are located; Provided, however, in addition to that which is herein stipulated, there shall nowhere be a meaning of any or all of the provisions or of the sections of this act, collectively or severally, so construed as to extend to any lessee the preference right of purchase to any of the lands withdrawn from homestead entry and granted to the State under and by virtue of Section 12 of the Enabling Act."

It will be noted that there were two conditions in this section: first, that the Commissioners of the Land Office might arbitrarily direct a re-appraisement of any land; and, second, that they should notify the lessee so that he might take his appeal within proper time, and that in either event, the land should be reserved from sale and should be leased.

It appears that DeArman could not be served with a copy and he was at that time the record owner of the land. Mr. Price testified at page 137 of the record as follows:

"Q. Did you secure a relinquishment later?

"A. Yes, sir; in a week or two weeks it finally come when we found Mr. DeArman; he was in Texas; nobody knew where he was."

This statement of Price is to the effect that DeArman was in October, 1909, in Texas but his residence was unknown and this appraisement was completed January 2, 1909, and the act requiring the sale and directing that notice be served before such sale was approved March 2, 1909; and the Resolution, which counsel claimed was an approval of this appraisement found on page 142 of the record, shows that the appraisement was approved March 25, 1909.

It appears now from an examination of these statutes that no sale could be made of this land, because the appraisement could not be served upon DeArman, whose residence was unknown, and the

appraisement was not satisfactory to Price. As his assignment was not of record, he was not served with the notice of the appraisement and had no right of appeal.

This condition apparently continued during 1909 and 1910. The sale in that county evidently was on the 18th or 19th of January, 1911, but Price not being the owner of the lease of record in the Land Office no notice of the appraisement was served upon him, and the land was not sold at this sale. (See Rec. pages. 168, 169) If on the other hand we assume that his assignment was recorded, we may look to the correspondence in 1910, on pages 232 and 233 of the record, which is as follows:

"Comanche, Okla., Feb. 19, 1910.

Mr. Ed. Cassidy,
Dear Sir:

I wrote you before Christmas about the re-adjustment of NE $\frac{1}{4}$ of Sec. 33 of Stephens County and you said you would notify me the first of the year when the adjusters come to Comanche Co. But they have already been there and have heard nothing. *I want to get this place re-appraised* and would like for it to be straightened out before the rest of the land sells, as I want it to go with the rest. Was not pleased with the first appraisement and if something is not done before time for it to sell there will be a balk in the sale. What must I do about this re-adjustment I wanted it done and you did not notify me when they met in Co-

manche County. Let me hear from you at once.

Respectfully,

W. T. Price.

P. S. If this is not going to sell this year I want to make a trade with you to cut some wood off the pasture land, but if it does sell I will not do it."

(Italics ours)

And Mr. Cassidy replied as follows:

"Feb. 21, 1910.

Re Re-adjustment.

Mr. W. T. Price.

Comanche, Okla. No. 4.

Dear Sir:

Replying to yours of the 19th inst., our record show you have on file an *application for re-adjustment and correction* of the 1908 appraisalment on the NE¹/₄ of Section 33, 1 S. 8. This application will be heard at the next meeting of the adjusters Board in Stephens County; it is not possible to have the hearing in time for the land to be placed on sale in the first sale of lands in that county; it will probably be next winter before this land will be sold.

Yours very truly,

Ed O. Cassidy,
Secretary."

(Italics ours)

Price did not want the land sold under the old

appraisement in 1909. He testified at page 164 of the record, as follows:

"A. Where they got it wrong, when I said I didn't want to sell, I said I didn't want to sell under that appraisement on my improvements; I said there were two men who were arranging to buy this place in if I signed this up, and when their adjusters came around I told them I wasn't willing to sell the way my improvements were appraised."

It appears that an adjuster had been around to see Price during the period between the first appraisement and the second appraisement, and when the second appraisement was made Price consented to and accepted the second appraisement as just and fair. It is obvious to us then that no sale could be made prior to the time the land was segregated.

Price, then, on the 21st of January, 1913, as appears from the record at page 26, took an agricultural lease to this land running for a period of two years, and on March 6, 1915, consented to an extension of this lease which appears on pages 30 to 32 of the record, which extended the lease until the 31st of December, 1915, and prior to the expiration of this lease, to-wit, on the 26th of August, 1915, the land was segregated for oil and gas purposes, and under the segregation statute the land was withdrawn from sale.

It would appear from the discussion of counsel in this matter that the sale statute would repeal all other statutes, and that the Commissioners had no

discretion except to provide a sale. If this was true, Price could obtain no rights. He could only buy the property when and if it was sold. The Act of Congress expressly provided in section 10 of the Enabling Act that, *if sold*, the land should be appraised and sold at public sale, and with the preference right to purchase at the highest bid being given to the lessee *at the time of the sale*; and it provided further that before any of said land should be sold, that the improvements and land should be separately appraised.

The Legislature could not pass title to Price in any form other than after such public sale. If the Commissioners of the Land Office neglected to do their duty, Price could have compelled by mandamus the officers to offer the same for sale. This right, however, was not confined to Price. Any citizen eligible to buy this land of the State had the right to bring such mandamus proceeding to compel the officers to perform their duty, if it was their duty to make such sale, and any citizen could make a bid upon the land, and if the lessee did not desire to purchase the land at the high bid, the highest bidder would become the purchaser of the land.

It certainly, however, cannot be contended that a citizen now could come into court and say it was the duty of the Commissioners to sell the land; that he was ready and willing to make the highest bid, and that the lessee would not purchase the land at his bid, and therefore he is entitled to the property. Admitting that the land officers were obligated to

make the sale by virtue of the Sale Statute, the situation would be very similar to a case where an execution is issued to a constabulary officer and the law directs him to execute such writ by levying upon, advertising, and selling the property of defendants.

Had the sheriff levied upon the property of the debtor and appraised the property, but failed to advertise or sell the same, then could a prospective bidder come in and assert that the land would have sold for only two-thirds of the appraised value, as provided by law, and that he was ready to bid that amount, or did actually offer the amount to the sheriff and ask the court to confirm title in him? The statement of such a proposition is its own answer. However, in the case at bar the land commissioners were not required to sell the property, but were expressly precluded from selling it both by the act of Congress and by the Segregation Act of the Legislature.

Counsel insist that the Sale Statute only reserves lands *known* to have mineral, and that this land *was never known* to have oil until after a well had been drilled on the land and oil produced. The Segregation Act withdrew the lands deemed valuable for oil or gas. The act of Congress provided, "where any part of the lands granted by this act to the State of Oklahoma *are valuable for minerals, gas, and oil,*" that the same should not be sold prior to January 1, 1915. It is, however, a quibble to assert that there is any difference between the phrases, "deemed valuable for oil;" "known to be valuable for oil," and

"valuable for oil." None of these statutes containing these phrases contemplate that such lands should be producing oil or gas, but the leases were made in order to induce development for the purpose of determining whether the same possessed oil and gas.

There could be no actual knowledge whether oil or gas existed in the bowels of the earth beneath the land, so that it was merely intended that when the Commissioners acting for the State, in the exercise of their discretion, determined that it was valuable for oil and gas, that the same should be segregated. The act of Congress in using the term, "valuable for oil and gas," was using rather a comprehensive expression. We say lands are valuable for oil and gas when the public is willing to buy a lease upon the land or pay a substantial price for mineral rights. The land is undoubtedly valuable for mineral when a substantial consideration can be obtained for such supposed mineral rights, though neither of the parties to the transaction may have any actual knowledge as to whether minerals are located under the lease.

But we pause to repeat that the Segregation Statute did reserve the land from sale, and the State did direct that the same should not be sold, and that if this statute was repealed, it was repealed by a State law and the question is a construction of a State law. When Chief Justice Harrison in his decision in the Supreme Court of Oklahoma held that the Segregation Statute was in force and prohibited the sale of this land, it was a construction by the

highest court of the State of a State Statute, and will be controlling in this court.

Forced Sale.

On page 88 of Sharp's Brief, under the sub-head of "Forced Sale," counsel say:

"We want to be clearly understood as asserting that we consider * * *

"(4) That the defendant, Price, lessee, accepted such statute, demanded his land at the auction, at his court-house, when all there was offered, and there being no other bidders, offered to take it at the appraised value on the terms fixed by the statute. (Appendix 'C'). He did all he could do.

"(5) That thereby, in legal effect a sale was consummated and the equitable estate passed, Price having done all the law imposed upon him, and the Commissioners having no option or discretion in the matter, and no power of refusal."

The fact that other lands were sold at "his court-house" would be immaterial and it would be equally immaterial whether bids were made or not for the other lands so offered. In other words, carrying the simile which we have heretofore given a little further, if a sheriff with an execution levied upon some lands of the debtor and advertised the same for sale, a purchaser who was desirous of bidding on other lands of the debtor could demand that the sheriff offer them for sale, and if he refused he could claim the equitable title to such other lands. However, in this case Price had

been notified by a letter from the secretary of the Commissioners that his land could not be sold because it could not be re-appraised within time for advertisement. His demand, if his action can be construed to be a demand, was upon the auctioneer, who had no authority to sell any land except such as he had been directed to, and he had been directed to sell only such lands as had been advertised.

After this excerpt, on the same page, counsel assert:

"The Supreme Court of Oklahoma did not disturb these findings of fact at all, and reversed the decree on the theory only that Price had no preference right in or to the land."

The reversal was on no such theory. The court recognized the preference right of Price to purchase at the time the sale should be made, but the court held that no sale had been made and that under the law no sale could be made by the officers of the State, and therefore Price had no interest in the land. In 1910, under the express provisions of section 8 of the Enabling Act, the State could not sell lands valuable for minerals, and under the Segregation Act of the State of Oklahoma, the Commissioners were required to segregate from time to time lands deemed valuable for mineral, and the order of segregation precluded a sale of the property.

There is much said in counsels' brief about the oil development taking all of the value of the land excepting, "such small salvage as might be from removed im-

provements." This is untrue. The substantial part of the surface is uninjured by oil development and operation. But the State was not required to lease the land to Price even for agricultural purposes, and much of the lands of the State are not leased. Some are laid off into town sites, some are leased for rock quarries and surface mining. The rule providing for leasing, gave to the lessee the right to re-lease only "in case the State desires to lease the land." If the State is not required to lease it at all, they might lease to Price only such portion of the land as is not necessary for mineral development and Price accepted his lease with the express provision in the Segregation Statute that it should be in all respects subject to the use of same for mining purposes. Upon the other hand, the Segregation Statute, being "Appendix B" of Sharp's Brief, in section 6, provided as follows:

"Any person, firm or corporation leasing under the provisions of this act and operating for oil and gas, shall be liable to the surface owner, the lessee or purchaser, for all damages or loss accruing to the surface interest in said land, and to all crops and improvements thereupon and appurtenances and hereditaments thereunto belonging, whether said land be agricultural, timber, grazing or otherwise."

On page 92 of Sharp's Brief it is contended that if the Commissioners were authorized by law to sell, and failed to sell, that it would be making such Commissioners superior to the law. This would not be true. On proper application the Commissioners would be re-

quired to comply with the law, but in the case at bar the Supreme Court of the State held that the Commissioners had strictly followed the provisions of the law and their acts were in all regards measured by the provisions of the law.

Counsel quote from section 21 of the Act of May 26, 1908, being an act different from the Segregation Act, but relating to mining prospecting on State lands. Section 21 of the act says that all preference rights, vested rights and equity, should be inherent rights, and after citing cases from Oklahoma, says:

"These opinions and the principles thereby established were by the State Supreme Court in this case overlooked, or at least not given effect."

(Page 94 of Sharp's brief.)

None of these opinions were overlooked, and none of these principles were misapplied. However, if the Supreme Court of the State did overlook or fail to give effect to these decisions, this court cannot correct the decision of the State court, but must accept the State decision as being a proper construction of the State statutes. Much is said that the findings of the trial court are unreversed by the decision of the Supreme Court. The findings of the trial court were all reversed and a perpetual injunction was issued by the Supreme Court.

Counsel at page 95 of Sharp's brief state the rule that equity treats, that which ought to have been done, as having been done, and says therefore that the Commissioners ought to have sold the land and that

equity will treat the property as having been sold. This is a correct statement of the law, but is a misapplication. If, for instance, a sale had been made by the Commissioners without an advertisement, the sale would be invalid because the Commissioners are required to have advertised the property. Or, carrying out the similarity suggested as to an execution sale, counsel would claim that he had title because the sheriff ought to have levied, appraised, advertised, and sold the debtor's property. This rule can never be applied when there is a condition precedent to the vesting of title. This maxim of equity is also denied when its application would confer greater rights on the party than he would have, had the obligation been performed.

Gardiner vs. Gerrish, 23 Me., 46.

It would be unlawful for the Commissioners to give a deed to Price without having advertised the property and procured the highest bid, and if such deed was given it would convey no title. Equity would not require the Commissioners to make title against the express law. However, the application of the maxim is upon a wrong supposition. The Commissioners were not authorized to sell, but were prohibited by the law of the land, both by the provisions of the Enabling Act and by the Segregation Statute of the State, from the selling of this land.

Analysis of Work, Secretary, vs. United States.

Counsel refer frequently to case No. 258, *Hubert Work, Secretary*, vs. U. S., decided April 12, 1923, and reported in 67 L. Ed. 640. This case merely follows

the decision of the court in *Lytle vs. Arkansas* and others, which provides that when it becomes the duty of the Secretary of the Interior to issue a patent for public lands, that he may be compelled to do so. This case does not fall under the class known as the *Yosemite Valley cases*, or the case at bar. In the case of *Work vs. U. S.*, the court was construing certain acts of Congress, passed February 19, 1912, 37 Stat. L. 67, and passed February 8, 1918, 40 Stat. L. 433.

The Act of 1912, provided that the Secretary of the Interior should appraise the surface of certain lands in the Choctaw and Chickasaw Nations in Oklahoma, and should proceed to sell the same. The second section of the act provided that where any of the said lands were leased for coal or asphalt, that a certain portion of such lands might be purchased at the appraised value by such lessee, and that in case he did not within sixty days elect to purchase the same, that the Secretary should set apart so much of the land occupied by him as he deemed necessary for operating the leased premises.

The Act of 1918 provided for the sale of the coal and asphalt deposits subject to existing leases, and further provided in Sec. 4, as follows:

"Any lease shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisal of the minerals as herein provided, to purchase at the appraised value any or all of the surface lands lying within such lease held by him, heretofore reserved by order of the Secretary of Interior."

The coal company failed to take the land permitted by the Act of 1912, and the Secretary set apart certain of the lands as therein provided. After the passage of the Act of 1918, the assignee of the coal company made application to take the land so set apart to it by the Secretary under the Act of 1912. The Secretary accepted the first payment on the land, but afterwards, on protest from the Indian Nations, decided that the mining lessee could not obtain the land without a reappraisement. The Chief Justice deciding the case held that there was no provision for reappraising the *surface* under the Act of 1918, and that the reference in Sec. 4 to the purchaser taking, at the appraised value, any and all of the surface of the land lying within such lease, held by him, and theretofore reserved by order of the Secretary of the Interior, was the granting of a new right to the lessee in possession to acquire the lands so reserved by the Secretary for his use, under the old appraisement of 1912.

The construction is obviously correct. The distinction, however, is so apparent between the proposition there considered and the one in the case at bar, that no extended argument is necessary. The price which the lessee in possession was required to pay was fixed by the appraisement, and the right was not preferential only, but exclusive. In the case at bar the Enabling Act provided that the "price" should be fixed by a public sale and that the highest bid received should be accepted, unless the lessee, at the time of such sale, elected to take the land at such high bid.

In the Act of 1912 construed in *Work vs. U. S.*,

supra, no other persons were permitted to bid upon the land until the mining lessee had been permitted to make his election, and in case such mining lessee refused to take the land at the appraised value, the Secretary should still set apart to him such surface as might be necessary for the operation of his mines; and in the later act provided that the mining lessee might take the same at the appraised value. It will be noted under the Act of 1912 that no sale of the land required for operating the mines was ordered, but the United States offered same to the mining lessee, and, if not accepted by the lessee, would not be sold. The Act of 1918 reoffered the land to the lessee. The lessee accepted the land so offered and tendered the money to the Secretary and demanded his conveyance.

The very reason why the court compelled the delivery of a deed in that case is absent from the case at bar. No price has ever been fixed by which the lessee can obtain the land in controversy, because no "high bid" has ever been received, and cannot be received until made at a public sale. The sale being prohibited by the Statute, as construed by the Supreme Court of the State, the "*price*" can never be fixed.

Analysis of Enabling Act.

Preliminary to our discussion in this case, we desire to give an analysis of sections 8 and 10 of the Enabling Act.

The first part of section 8 grants certain lands for school and other purposes, and then provides that section 33 shall be apportioned and disposed of as the

Legislature of the State may prescribe. This section granted section 33 and other sections to the State for certain designated purposes. The State became the owner of this land in fee simple and had every right of ownership therein that could be given to the State, except some minor restrictions, which we will hereafter discuss. The last clause of this section provided:

"Where any part of the lands granted by this act to the State of Oklahoma are valuable for minerals, gas and oil, such lands shall not be sold by the said State prior to January 1, 1915; but the same may be leased for periods not exceeding five years by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require, and the advertisement shall specify in each case, a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which that shall properly belong, and no transfer or assignment of any lease shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: *Provided, however,* That agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest therein by reason of such mining operations. The Legislature of the State may prescribe additional legislation governing such leases not in conflict herewith (34 State L., 273)."

The analysis now of this provision shows that the grant of all this land to the State carried with it the right of sale, except as in this section prohibited. It is an obvious rule of the construction that where a general grant is followed by an exception that the exception extends rather than limits the term of the general grant. Congress necessarily understood that this grant gave the State the right to sell the land, because in the quoted provision, it is provided:

"Where any part of the lands granted by this act to the State of Oklahoma are valuable for mineral, gas and oil, such lands shall not be sold by said State prior to January 1, 1915."

It would not have been necessary to have provided that the land should not be sold, had the power to sell not been previously given. It will be noted also that the limitation against a sale expired on the first of January, 1915. The reason for this limitation was the absence of State laws. At that time there was no provision of law in Oklahoma for leasing of lands of the State or Territory for oil and gas purposes, so Congress provided for the leasing for oil and gas purposes, but limited the Congressional restriction to a definite period and closed the section by providing that the Legislature of the State may prescribe additional legislation governing such leases not in conflict therewith. The period of limitation was sufficient to enable the State to become organized and the Legislature to adopt the necessary rules and regulations governing the further leasing of such lands.

It was further provided in this section that not-

withstanding the prohibition against a sale, that the lands might be leased for periods of five years by State officers duly authorized for that purpose. The provision that said lands shall not be sold, necessarily did not prohibit a leasing, because such prohibition was followed by a provision permitting and directing the manner of such leasing.

We think it is important to note that the word, "sale" as used in this clause, providing that "such lands shall not be sold," referred to a conveyance of the fee of the land and prohibited a conveyance of the fee, but that such prohibition in no way affected the power to lease the lands for oil and gas purposes. In other words, a lease for mineral purposes was not a sale as the term was used in the statute.

The Circuit Court of Appeals of the Eighth Circuit, in the case of *Kemmerer vs. The Midland O. & D. Co.*, 229 Fed., 872, analyzed the acts of Congress with reference to the Cherokee Indians and show that provisions prohibiting the sale of land do not prohibit the leasing of lands for mineral purposes. It also states clearly the principle that when the act of Congress has shown that the oil and gas may be severed from the fee or surface, that it is not covered by the rules or regulations providing either for the sale or the agricultural leasing of the surface. The court, in the first paragraph of the syllabus, says:

"Even in the absence of statute, the owner of land in fee, who has leased the surface without reservation, has the right to drill through the surface for oil or gas, and may convey that right by

lease to another. But as to Indian lands coming within its scope, such right is reinforced by the Act of May 27, 1908, Chapter 199, Section 2, 35 Stat., 312, which provides that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for a period of more than five years may be made without the approval of the Secretary of the Interior, the effect of which is to make a severance of the oil and gas right from the surface."

It is obvious that the latter clause of section 8, which expressly severs or segregates the mineral deposits from the surface for a fixed period of time and provides that the Legislature may prescribe additional legislation, segregates the oil and gas deposits from the surface. However, as stated in the case of *Kemmerer vs. The Midland O. & D. Co.*, *supra*, even in the absence of statute, the owner of land, which in this instance, is the State, may segregate or sever the different strata, and may sell or lease any of same.

The word "sale" as applied to real estate, has never been construed to embrace a conveyance of an oil or gas lease. In the case of *Tibbens vs. Clayton et al.*, 288 Fed., 393, in a decision by Williams, District Judge, is found a collation of all of the authorities as well as an analysis of all of the Statutes of Oklahoma affecting a sale of an oil and gas lease.

In the case being there presented the discussion related to a sale of an oil and gas lease by a guardian of a minor under a Statute which required that the sale of real estate, must be in a particular form. Judge

Williams approved the rule stated in *Duff et al. vs. Keaton et al.*, 33 Okla., 92, in the following quotation:

"A lease granting oil and gas mining privileges for a term of years, is not a sale of realty as contemplated by Sec. 5314, Compiled Laws of 1909, or Secs. 5489 and 5491, Compiled Laws of 1909."

The sections referred to in *Duff vs. Keaton*, *supra*, are the provisions of the law of Oklahoma authorizing the guardian to sell the property of his ward. The Statute provides that a petition shall be filed with the County Court and a notice shall be given to the public and all parties interested in the land and upon a hearing the court should make an order of sale, and after proper advertisement the guardian might sell the property and report to the court for confirmation, and that such report should also be publicly advertised for at least ten days prior to the hearing on the application to confirm.

The question arose in *Duff vs. Keaton*, *supra*, and in the case of *Tibbens vs. Clayton*, *supra*, whether these provisions regarding the sale of the land should be compiled with in the sale of an oil and gas mining lease. The court held that an oil and gas mining lease being a mere incorporeal hereditament, that it would not be embraced under the provisions authorizing a sale of the real estate. In *Tibbens vs. Clayton*, *supra*, it was further stated:

"Under *Duff et al. vs. Keaton et al.* and *Allen vs. Midway Oil & Gas Co.*, which were handed down at the same time, the Supreme Court of Oklahoma

established the principle that the jurisdiction of the county courts of the state of Oklahoma to order a lease made by a guardian of his ward's land for oil and gas or such mineral purposes is not derived from the statute providing for the sale of real property, that holding being induced in a measure by the practice and usage followed by the county and recognized by the district courts and Secretary of the Interior, which had existed from the erection of the state under which a multitude of investments had been made and vast property rights arisen."

In support of the principle stated is an array of citations, which disclose that it is the universal rule in the oil producing states that an oil and gas lease is not embraced within the prohibition against the sale of real estate.

This court in the case of *Parker vs. Richards*, 250 U. S. 235, in an opinion by Justice Vandeventer, held, that the Act of Congress authorized the County Court to approve conveyances of real estate of full blood inherited lands, but did not authorize the County Court to approve oil and gas mining leases.

While we may be now anticipating the provisions of section 10, giving the lessee a preference to buy at the time of the sale, in this connection we call the court's attention to the provisions of section 8, which provide that such lands shall be leased for oil and gas purposes at *public competition*, after not less than thirty days' advertisement in the manner prescribed by law, and all such leasing shall be done under *sealed bids and awarded to the highest responsible bidder*.

This section gave no preferential right to the agricultural lessee, and he was not permitted under this section to take an oil and gas lease at the "highest bid." There are many reasons, of course, why the agricultural lessee was not given any preference. Oil and gas development requires expert knowledge, considerable investment in machinery and tools, as well as in equipment; and in order that the lands shall only be leased to persons possessing the necessary means, it was provided that the lease should be awarded to the highest responsible bidder. The agricultural lessee would neither possess the skill nor the equipment for such development. The section then provided that the agricultural lessee in possession should be reimbursed by the mining lessee for damages done to the agricultural lessee's interest.

Section 10 of the Enabling Act provided:

"Said sections thirteen and thirty-three aforesaid, if sold, may be appraised and sold at public sale in one hundred-sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale," etc.

The word "sold" as used in this section, must be given the same meaning as we have given to the word "sold" in section 8, and this section authorized that the legal title or fee simple estate of the lands might be sold at public sale.

Counsel have conceded now that the words "if sold" were not the granting of the power to sell, but

a mere recognition that such power had been granted by section 8. Congress assumed that the Legislature had this power and stated merely that "if sold" the lands should be appraised and sold at public sale. This was a definite limitation upon the power of sale and prohibited any sale except at public sale. The preference right granted in this clause attached at the time of such sale.

This section continued with further restrictions, as follows:

"But such lands may be leased for periods of not more than five years under such rules and regulations as the Legislature of the said State shall prescribe, and until such time as the Legislature shall prescribe such rules, these and all other lands granted to the State shall be leased under existing rules and regulations."

The existing rules referred to were those adopted by the Secretary of the Interior. One of the provisions which seemed to be urged as very important is rule 8, in regard to the renewal of a lease, which provided:

"In case a new lease is to be made at the end of the third year, the preference should be given the former lessee, if the Governor finds that he cultivated the land in a business-like manner and fulfilled the terms of the lease in good faith."

The rule was, however, modified by the act of the Legislature, effective May 26, 1908, which provided that if the land was deemed valuable for oil and gas, a lease should be made of the surface interest only, and that such lease "shall reserve to the State, its lessees

or grantees, the right to drill and operate oil and gas wells on such premises, and the easement, use and right-of-way to enter upon and fully enjoy the mining right reserved in this act."

Section 10 of the Enabling Act expressly authorized the Legislature to make rules governing the leasing of lands for agricultural purposes.

The word "may" in the clause, "if sold, may be appraised and sold at public sale," should probably be construed as "must," because the latter part of this section contained the following proviso:

"Provided, That before any of said lands shall be sold as provided in Sections 9 and 10 of this act, the said lands and improvements thereon shall be appraised," etc.

Congress evidently did not intend to lodge a discretion with the State as to whether said lands should be appraised, because of the later inhibition prohibiting a sale without appraisalment.

We have argued the proposition that Price was not preferred in the purchase of a mining lease upon the land under the act of Congress and the acts of the Legislature, and applied what we think is the correct rule of construction. Where a word is used in a statute in a definite sense, it will always be presumed to have been used in the same sense where ever the word occurs. In section 8, it is obvious that the word "sold" was applied only to the sale of the fee of the land, and not the sale of oil and gas mining leases. When the word occurs in section 10, it would be presumed to have had the same

meaning, and when it is provided that the land shall be sold, it would be presumed that it meant when the fee of the land was sold.

In 2 *Lewis' Sutherland Statutory Construction*, section 399, it is said :

"A word or phrase repeated in a statute will bear the same meaning throughout the statute unless a different intention appears."

In 25 *R. C. L.*, 994, the rule of construction is stated as follows:

"In addition to considering the independent, technical, and popular meanings of a word used in an act, other sections of the same act may be resorted to as an aid to determining the sense in which the word is used, and a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended. Where a word susceptible of more than one meaning is repeated in the same act or section of an act (either meaning being in each case open to reasonable adoption), a presumption arises, more or less forcible according to the circumstances, that it is used throughout in the same sense."

In *Ryan v. State*, 174 Ind., 464, it is said:

"When the same word or phrase is used more than once in the same section of an act, and the meaning is clear as used in one place, it will be construed to have that meaning wherever used in said act or section unless there is something therein to show that there is another meaning intended."

But an analysis of section 10 of the Enabling Act

conclusively discloses that the sale of lands therein provided, did not embrace a sale of the mineral, timber, stone, and sand, though these elements may be constituents of the land. Section 10 provided, among other things:

"That before any of said land shall be sold as provided in sections nine and ten of this act, the said land shall be appraised * * * and said appraisers shall make a true appraisal of said land at the actual cash value thereof exclusive of improvements and shall separately appraise all permanent improvements thereof at their fair and reasonable value, and in case the lease-holder does not become the purchaser at said sale, shall, under such rules and regulations as the Legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements and to the State, the amount of the bid for said land exclusive of the appraised value of the improvements."

It is clear that if the land was sold under section 8, which permitted leasing for minerals, the law did not require that improvements should be appraised, and therefore the sale permitted in sections 9 and 10 alone recognized the passing of the fee which entitled the settler to take at the highest bid. The sale of mineral is provided by section 8 and is expressly excluded by section ten in the following:

"That before any of said land shall be sold as provided in sections *nine* and *ten*, the said land and the improvements thereon shall be appraised."
(Italics ours.)

This clause recognizes that the only "sale" author-

ized is found in sections nine and ten, and not in section eight.

Again, section 8 contemplated that the whole surface would not be required for the operation of mining leases, and the agricultural lessee should be paid "for all damage done to the agricultural lessees' interest." It did not require the appraisalment of all of his improvements and payment for the whole by the mining lessee. Section ten, however, requires that the lessee, if he fails to take the land at the sale, shall be paid for the *whole value of his improvements*. Then the sale provided for by section 10 must be one that entirely appropriates the improvements and takes exclusive possession of the premises, and necessarily is a sale of the fee, while section 8, whether the mining lease passes an interest or not, does not require the payment for any improvements but only for the damages occasioned.

This was a practical distinction. Mineral leases expire, and if the mining lessee is required to buy the improvements, he obtains no right to the use of the surface for any other purpose than mining and is not entitled to collect the value of the same from the purchaser at any later sale so that the investment becomes a total loss. Again, a mining lessee might only use a small portion, for instance an acre of the lease, but if he must buy improvements on the 159 acres which are suitable only for farming, and which he is not permitted to engage in, he loses the amount invested in the improvements.

Therefore we assert that the mining leasing was not a sale, no preference rights are granted and none of the requirements relating to a sale is imposed. The limitation prohibiting a purchaser from buying more than 160 acres, does not apply to the mining provisions because a responsible person may acquire an unlimited acreage for mining purposes.

The preference right to purchase was limited by Section ten to one hundred and sixty acres, but this limitation did not apply to the leasing for minerals. If a mining lease was sold for a section at a bonus, the agricultural lessees' right being limited to a quarter section, could not determine the part of bonus applicable to his leasehold.

From these sections, construed as a whole, it is apparent that Congress granted certain lands to the State to be held in fee simple with certain restrictions thereon. The important restriction was that lands valuable for mineral purposes should not be sold for a definite period, but might be leased for minerals, and that the Legislature might prescribe additional legislation governing such mineral leases, and providing that there should be no preference right given to an agricultural lessee for the purchase of such mining lease, that it should be sold at public sale and the lessee should only have the right to take the land at the highest bid at the time of the sale. If the leasing for mineral carried such an estate, that it will be regarded as a sale, the Enabling Act provided for two classes of sale, one of which was a sale of the fee and the other was the sale of the min-

eral. In the latter case the agricultural lessee had no preference right to buy.

The act further provided that the lands might be leased prior to such sale under the rules and regulations prescribed by the Legislature of the State. The Legislature prescribed rules for the leasing of said lands, both for mineral and agricultural purposes, and the Price lease was made under these rules and regulations on the 2nd day of January, 1913, by the State of Oklahoma and William T. Price, a copy of which appears at page 26 of the record. Price expressly agreed to the terms of the lease, and expressly agreed that he took only the right to the surface. At page 28 of the record is a clause in this lease, as follows:

"The said party of the second part (W. T. Price) hereby agrees, binds, and obligates that he is leasing said lands for agricultural and grazing purposes and that he will use and occupy the same for no other purpose."

It is also apparent that under this Enabling Act the State could not sell to Price this land unless the same had been offered at public sale and the high bid had been procured. If the State could not give this right even by its most solemn legislative sanction, we have never been able to understand how it could be contended that a court could enter a decree that would accomplish this result. The Supreme Court of the State held that it could not be done, and until the land was sold and "a high bid" had been obtained and Price had elected to take it under that bid, he could acquire no right or interest in or to the land.

The Legislature in its rules and regulations governing the disposition of its lands provided, in section 3 of the Act of May 26, 1908, as follows:

"The oil and gas interest described in this act in such lands may be leased by the Commissioners of the Land Office for oil and gas purposes to the same extent and in the same manner as a private owner of lands in fee could, in his own right, execute a grant thereto, subject, however, to the following limitations."

The limitations were substantially the limitations provided for by the act of Congress. These limitations were necessarily the same up until the first day of January, 1915, and the Legislature was continuing said limitations beyond said period. Under these sections of the Act of Congress, it must be clear that Price never obtained any interest in this land, or to the oil and gas thereunder. Not having any interest in the same, we have always insisted that he had no right to ask any court to construe these acts with reference to the right of the State to dispose of the mineral interest therein. If the State owned the oil and gas rights, and Price had no interest therein, how can Price be heard to challenge the manner in which the State sees fit to dispose of them?

Fee Farm Rent.

Both counsel in their brief have discussed at some length the old rule of fee farm rent. We do not care to discuss this question at any length. It is a principle that has not been applied generally in the United States,

and one wholly inapplicable to the condition created by the Acts of Congress which we have examined. A condition precedent was created by these acts before the preference right became operative. It is almost absurd to say that Congress in 1904 reserved certain lands for school and other purposes, to be held by Congress until the State had been formed, and then to grant such lands to the State and in the face of these acts claim that Congress did not grant them to the State, but granted them to the lessees in possession.

By acts of the Legislature the Commissioners fixed the rentals and by their benevolence the lessees procured these lands with a little trifling rental of 4 per cent on their appraised value. This 4 per cent was less than the average taxes which were paid by the other landowners of the Territory and State. But at no time did Congress or the State ever attempt to give any right to re-lease the lands in perpetuity. It was provided that in case the State desired to re-lease them and the lessee satisfied the Governor of his good faith and good husbandry, the lessee should have the preference to said renewal. Price never claimed that he attempted to satisfy the Governor in this regard and the Legislature saw fit not to renew such leases, but provided that if they were valuable for mineral, that a lease only of the surface might be made.

But the amount of the rentals were unfixed by law and subject to changes at any time by an order of the Commissioners of the Land Office. The claim of the right in perpetuity is based upon a possession

dependent upon the landlord desiring to renew a lease, dependent upon satisfying the landlord that he was a proper tenant and acting in good faith, and dependent upon the parties agreeing upon the annual rental. It is impossible to fix a tenure, in nature of "fee farm," under such indefinite conditions.

Governor Steele, the first Governor of Oklahoma, prepared and submitted to the Secretary of Interior certain rules governing the leasing of certain lands. An excerpt of his letter appears at page 190 of the record, and is as follows:

"It seems there ought also to be a clause giving the lessee preference, where a new lease is to be made, at the end of the third year, if one is made, provided he has cultivated the land in a business-like manner."

He submitted ten proposed rules which were subsequently adopted. Rule 3 provided as follows:

"Sealed bids shall be received after proper public notice to be given in the manner deemed by the Governor the best practicable under the circumstances, and the lease to be awarded to the actual bidder at the highest amount of rent bid in each case."

Rule 8 provided:

"In case a new lease is to be made at the end of the third year, the preference shall be given the former lessee, if the Governor finds that he cultivated the land in a businesslike manner, and fulfilled the term of the lease in good faith."

These rules continued in force until the State Leg-

islature passed the Segregation Statute in 1908. On March 22, 1909, a general act was passed providing for the leasing of lands. The provisions which we desire at this time to call attention to are Sections 4 and 5, Article 1, of Chapter 28, of the 1909 Session Laws. Section 4 provided for the leasing of public lands which would embrace Sections Thirty-three in the State, but provided that the amount of the rental should be fixed by the Commissioners of the Land Office. Section 5 provided that a sworn application should be made by each lessee, accompanied with willingness to pay "such rental as the Commissioners of the Land Office may fix."

It will be observed, therefore, that under the rules of the Secretary of Interior in force during the Territorial Government, no fixed rental was provided for, but the lessee was permitted to take the lease at the end of three years at the highest bid that might be offered for the particular tract of land. This rule continued in force until the passage of the Act of March 22, 1909, which provided that the Commissioners of the Land Office should fix the rental and that the land might be re-leased to the tenant in possession upon the filing of a sworn application asking for permission to lease the land and showing that he was the head of a family, above the age of twenty-one, and expressing a willingness to pay the rental to be so fixed.

There were no provisions giving a preference right to lease these lands except by implication, but we are willing to concede that the fair implication of this Act

was that the lessee in possession, coming within the terms of the Act, was entitled to re-lease the land.

It is an obvious principle of law, however, that no contract is created to perpetually lease lands whenever the owner reserves the right to lease or not, and the lessee does not stipulate to take for any definite period, and the amount of rental is not determined. The lessee, of course, could not agree to take the land indefinitely, because he could not in advance determine whether he could accept a tract of land from an owner who had the right to arbitrarily fix the rental. Besides, his preference right was not a right which obligated the State to lease the land to him, but merely gave him a right to be preferred as to other applicants if the State did lease the land.

Lessees' Preference Right.

The preference right accorded the agricultural lessee to purchase the land at the time of the sale of the fee, is not a vested right.

In *Hutchings vs. Low*, 82 U. S., 77, referred to by plaintiff in error as controlling, this court said:

"Such claim, it must be remembered, is only a claim to be preferred in the purchase of lands of the United States in limited quantities, at fixed price, when the lands are offered for sale in the usual manner. When one has acquired this claim, by complying with the conditions of the law for its acquisition, he has a legal right to be thus preferred, when the sale is made, as against others asserting a similar right under the law, which the

court will enforce in proper cases. But the claim of pre-emption, as already said, can never arise when the law does not provide for the sale of the property. Until thus sanctioned by the law, the claim is stated by the court in that case (*Lytle vs. Arkansas*, 9 How., 333) has no existence as a substantial right."

Again, it is said:

"The whole difficulty, in the argument of the defendant's counsel, arises over his confounding the distinction made in all cases whenever necessary for that decision, between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States; and the acquisition by him of a legal right, as against other parties, to be preferred in its purchase."

Applying this last statement of the law, we can easily show the invalidity of Price's claim. Price would be preferred to all other purchasers, and this would be the extent of his right. There was no other purchaser, because no bid had ever been received; therefore his preference right had not come into operation.

In *Russian-American Co. vs. U. S.*, 199 U. S., 570, is found a recent clear expression of this court. It is said:

"We have had occasion, in several cases, to hold that, although the occupation and cultivation of public lands, with a view to pre-emption, confers a preference over others in the purchase of such lands by the bona fide settler, which will enable him to protect his possessions against other

individuals, it does not confer a vested right, as against the U. S. in the lands so occupied. Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and a receipt from the proper land office given to the purchaser. Until this has been done, it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler."

In *Frisbie vs. Whitney*, 9 Wall., 187, it is said:

"When this payment is made and other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local land office, and, ultimately, to a patent."

Mr. Justice Field, in *Hutchings vs. Low*, 15 Wall., 77, uses this language:

"It seemed to us a little less than absurd to say that a settler, or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires the right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

At page 27 of Sharp's brief, under the subhead "Questions Presented," we find a remarkable basis for their claim of title to the property in controversy. They say:

"This record presents then, clearly and unequivocally, and it is the desire of all parties so to do, the question—

"1st. As to what right, if any, was granted by the Enabling Act, section 10, to the lessee hold-

ing the lands granted by that act to the State, by his 'preference right of purchase.'"

We insist that the "preference right to purchase" can arise only at the time of a sale, and, as no sale has ever been ordered, of this property, a definition of the term is not decisive of this controversy.

Counsel then states, as his second question, the following:

"2nd. Were the rights so granted such rights as, when accepted and relied upon by the lessee, could not be impaired, taken, or avoided by the State, as by its Legislation (Appendix 'B' herein), without violating the Constitution of the United States?"

Again, the question presented is wholly irrelevant. What rights the lessee would have had, if the sale had been made and he had accepted and relied upon the law by tendering the purchase price, is not material, because it is obvious that the State of Oklahoma would have given him title, and no question could now be presented to this court. "Appendix B," referred to by counsel, is the act prohibiting the sale of the land, so that the lessee could not have accepted the conditions of a sale not made, and one which, under the law, could not be made.

Counsel's third question is stated as follows:

"3rd. Were the rights granted to Price, lessee, by the Sale Statute (Appendix 'C'), such rights as, when accepted and relied upon by him, could not be subsequently impaired by the State, or its Commissioners acting under the authority

of the State, and particularly by their 'deeming' the land valuable for oil and gas purposes (under Appendix 'B'), on August 26, 1915, without violating the Enabling Act and the Constitution of the United States?"

There is a combination of errors put into this question. First, the law providing for the segregation of this land was passed prior to the act authorizing its sale, and the sale statutes, therefore, do not authorize the sale of any land valuable for minerals. Neither the Enabling Act, nor the Constitution of the United States, require any sale of the property, but the Enabling Act lodged with the State the discretion of holding or selling the property. If it was to be sold, it could only be done under the provisions of the Act of the Legislature. These acts of the Legislature have been construed by the highest court of the State and that court has said that such land could not be sold. It was not only so stated in the decision of the case at bar, but also in the case of *Roma Oil Company vs. Long* (Oklahoma), 173 Pac., 957. We have shown, in our motion to dismiss, that the construction of the State statute, by the Supreme Court of the State, will be accepted as a correct construction in this court.

The fourth inquiry is, as follows:

"4th. Were the rights held by Price, as lessee, under the Enabling Act and the Sale Statute (Appendix 'C'), and the Constitution of the United States such rights as could not be impaired, avoided or taken by the State as by Statute (Appendix 'B'), and the authority exercised by the Commissioners, thereunder, in executing the

oil and gas lease to the Magnolia Company, January 4, 1919, without violating as to Price, the Constitution of the United States?"

We think the argument of Mr. Justice Field, in the *Yosemite Valley case*, is very pertinent, when he said:

"It seemed to us a little less than absurd, to say that a settler, or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires the right to compel the owner to sell or such an interest in the property as to deprive the owner of the power to control its disposition."

But the rights held by Price have, in no way, been impaired or avoided. His right was to use the surface for agricultural purposes, or, in case of sale, to take the property at the highest bid. All these rights are respected by the decision of the Supreme Court of Oklahoma.

The fifth inquiry is as follows:

"5th. Summarizing, was the act of the Legislature of 1908 (Appendix 'B') constitutional as to Price, and this particular land, and were the proceedings of the Commissioners thereunder—

"(a) in 'segregating' this land by their 'deeming, resolution on August 26, 1915, and

"(b) in leasing it for oil and gas purposes on January 4, 1919 (while held and possessed by Price under the Enabling Act and Sale Statute of 1909), (Appendix 'C') constitutional?"

As we have shown, the Enabling Act did not provide for any sale of the land, but merely imposed certain restrictions upon the sale, in case same was made,

and we are compelled to look to the State laws to determine whether the same should be sold. The Constitution of the United States, of course, has no application to either of these questions. It is merely an effort to insist that some Federal question is involved, and clearly shows that no *bona fide* Federal question is presented, and the appeal should be dismissed. If, however, we are mistaken in this, there is no possible question that can arise involving the constitutionality of a sale statute, until some sale is made, or some act has been done, under such statute, which tends to deprive somebody of some vested right. Until the sale is made, the land could be leased, either for oil or gas, or be leased for agricultural purposes. Following these discussions, counsel has, at page 30, Sharp's brief, enumerated many of the contentions of Price. The very basis of his contention, as shown on page 29, is as follows:

"The defendant Price contends that the Enabling Act, section 10, gave the State only limited authority over said land, such authority being

"1st. To hold it as a trust estate, or

"2nd. To sell it as a trust estate."

There was, of course, no intimation that the State should sell this land as trust estate. The direction was that the State should sell and the proceeds should be held in trust.

It is then further stated:

"That if the State elected to hold the land and lease it, the land could be leased

"1st. For 'periods' not exceeding five years:

2nd. Under 'existing rules and regulations' (which appear in Record, at 133-134 with letter of Governor Steele, 129-133),

until the Legislature presented new rules, (Enabling Act, section 10), *which it did not do.*"

The above italicized by us is an erroneous statement as is shown in "Appendix B," an act which expressly regulated the manner of leasing and contained the rules and regulations governing the same. Section 2, of this act, reads as follows:

"Each agricultural, timber, grazing or other lease to any surface interest in the deposits segregated, as provided in section one hereof, and further reserve to the State and its lessees and grantees the right to drill and operate oil and gas wells on such premises, and the easement use and right of way to enter upon and fully enjoy the mining right reserved in this act."

This was a definite rule and regulation, and it was under this rule and regulation that the lease was made to Price.

Counsel further states, commencing at page 30:

"The defendant claimed that under the Enabling Act, section 10.

"1st. A preference right of lease and release that insured him secure tenure and exclusive possession, so long as the State elected to lease, and not to sell."

A preference right to lease and release did insure a secure tenure to the lessee. This tenure, however,

was that he should have the use of the surface of the land, but should have no right or interest in the mineral, and should not, in any way, interfere with the operations of the State, or its lessee, in the production of oil or gas. He had no exclusive possession, because a dominant right to use the surface for mining was expressly reserved by the law, and by the terms of his lease. He did not, however, have the right to release the property, as long as the State elected to lease it, because the original rule referred to authorized the releasing, provided as follows:

“In case a new lease is to be made at the end of the third year, the preference should be given the former lessee if the Governor finds that he cultivated the land in a business-like manner and fulfilled the terms of his lease in good faith.”

When he asserted title against his landlord, he was not acting in good faith and lost his right to release the land. It would have been only the right to release one time, because the rule expressly provided that, at the end of the *third year*, a preference should be given to the former lessee. This right to renew the lease is very indefinitely allowed, if allowed at all and, the preference right to renew the lease, like all preference rights, gave no right against the owner but merely the right to be preferred to other persons offering to lease same. Of course, the preference right to release was conditional upon the lessee satisfying the Governor that he had farmed the land in a husband-like manner and acted in good faith.

In his second contention, found at page 31, Sharp's

Brief, he alleges that the preference right to purchase always existed, but that it was unenforceable until the State's election to sell. This is a clear mis-statement of the language and meaning of the Enabling Act. The Enabling Act did not provide that *when the State elected to sell* that the lessee should have the preference right, but it provided that *at the time of the sale*, he had such preference right, and whether or not the State passed a law authorizing the sale of the land, would be immaterial in determining whether Price owned the land, because it required a sale, and the *exercise* at such sale of a preference right to purchase before Price became interested in the title of the land.

In this connection, it might also be urged that plaintiffs in error disclose, in their brief, that the land could not be sold, even though it had never been segregated. See "Appendix C," found at the end of Sharp's Brief. In section 15 of this act, approved March 2d, 1909, the Legislature of Oklahoma provided:

"Section 15. All the lands not leased, described and enumerated in section 1 of this act. shall be opened for sale immediately upon the appraisement of the same as provided in this act and by law, and all of said lands offered for sale under the provisions of this act that are leased shall be sold upon the expiration of each lease contract, or sooner upon petition of lessee to the Commissioners of the Land Office, asking for sale of any of said lands so leased."

Section 4 of this act provides for a review of any appraisement made, and, in a proper case, authorizes the Commissioners to make a re-appraisement. The

Commissioners were required to serve copy of appraisal on the lessee so that the lessee could by appeal preserve his right, but from the fact that De Arman owned the lease of record and Price was in possession claiming same, the service was not made. Price recognized this situation and took an agricultural lease, found at page 26 of the record, dated January 2nd, 1913, which ran for the period of two years, expiring on the 31st day of December, 1914. On the 6th day of March, 1915, the Commissioners of the Land Office executed an extension certificate, which was accepted by Price, as found on page 32 of the record. This certificate extended the lease to the 31st day of December, 1915. Price testified that he was present at the sale of various lands held in Stephens County in 1910-11, when other lands in that county were offered, and, at that time, he made a demand. It will be noted that, at that time, Price was holding under an unexpired lease held by DeArman. At page 56 of the record, is an extension agreement, showing that the De Arman lease expiring on the first of January, 1909, is extended to the first day of January, 1910. Assignment or relinquishment of this lease was executed by De Arman on the 15th day of October, 1909, but Price's evidence discloses that this assignment was placed in a bank, and remained there for approximately nine months.

Price testified, commencing at page 136 of the record, that he sent DeArman's relinquishment to the Commissioner of the Land Office, but that he was not satisfied with the appraisal, and that the new appraisal, which he consented to was made on the 30th day

of August, 1915. (See Rec., page 149.) It would be obvious, then, that, under the law, Price acquired no right to even compel the sale of his property. The Commissioners of the Land Office could arbitrarily order a new appraisal, and when Price complained, though he did not appeal, as provided by the statute, they ordered a new appraisement, but, before the new appraisement was made, the land was segregated. Price claimed that when the general sale was made in 1910, he went out and demanded that his property be sold, but his land could not be sold, because the same was not advertised and no appraisement had been made and accepted by the parties in interest.

It will be observed, also, that, subsequent to this purported demand for sale, to-wit: On the 2d day of January, 1913, Price took a lease on this tract of land, expiring on the 31st day of December, 1914. However, before this appraisement was made in 1915, as appears from page 149 of the record, to wit, on the 26th day of August, 1915, the land was segregated for mineral purposes. It must be apparent, then, that, under the law, the land could not be sold until it was appraised, and that, prior to its appraisement, it had been segregated, and, under the law, could not be sold at all.

These are matters governed by the laws of the State, and the Supreme Court of the State has held that, under these laws, no sale could be made. The act of Congress only provides *that in event a sale was made*, Price should have a preference right. The laws of the State prohibiting the sale, and the State officers, acting under those laws, did not make a sale, and we are un-

able to conceive how it can be said that any act of Congress, or any provisions of the Constitution of the United States, were violated.

Counsel at page 110 of Sharp's brief, say:

"Price denies the Commissioners' rights to make the oil and gas lease; about this there seems no reasonable ground for doubt. He is in no position, then, to take an oil lease on what he claims as his own land, or on land which he has a right to acquire and own."

From this excerpt it is obvious that there is no claim made to the oil and gas mining lease, so that the construction of the term "sale" loses much of its importance. But in the next breath counsel attempt again to reassert in an indefinite way Price's right to the oil lease. At page 111, Sharp's brief, he says:

"The Enabling Act, section 10, requires of the Legislature that the lessee be given the preference right to purchase 'under the rules and regulations as the Legislature may prescribe.' The rules and regulations prescribed for oil leases (Appendix 'B') may be searched in vain for compliance therewith. It neither gives nor recognizes any preference."

This is a correct statement of the Segregation Statute. No preference right was given to the lessee. But section 10, which gave the preference right, only gave it when a sale of the legal title was made, and therefore the Act of Congress did not require that any preference right should be given when an oil and gas mining lease was sold. In fact, section 8 prohibited the giving of such preference right and

required the land to be sold to the highest and most responsible bidder.

Counsel then, at page 111 of Sharp's brief, at some length have suggested that if the State could sell the oil rights at one time and sand and rock at another, and the water and timber at another, that the value of the property would be destroyed and that the preference right would be without value. It may be that the preference right would be without value if the land was sold, because the bid might exceed the value of the land, but the lessee was given the right to decide whether he wanted it or not, and he was not required to take the land but merely had the privilege of taking it if he regarded the land of greater value than the price offered.

Counsel take exception to our statement found in line 26 at page 14, supporting motion, to dismiss, in which we stated that the Enabling Act prohibited the sale of this land in 1909, at the time of the passage of what is termed the Sale Statute, and we reassert this absolute truth. The Enabling Act prohibited, until January 1, 1915, the sale of any land valuable for oil and gas, and this land was valuable for oil and gas, and therefore it could not be sold. The Legislature, before the expiration of the limitation in the Enabling Act, further provided by the Segregation Statute, that it should not be sold.

The Segregation Statute.

The Segregation Statute passed by the Okla-

homa Legislature at the session of the first State Legislature, found in Sharp's brief as "Appendix B," in part provided:

"When any tract of the school lands and other public lands granted to the State of Oklahoma under the act known as the 'Enabling Act,' is by the Commissioners of the Land Office of the State known to contain oil or gas, or where such lands are by said Commissioners deemed valuable for oil and gas purposes, such Commissioners shall enter of record in their office, their findings, declaring that such oil or gas character exists, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposit shall conclusively withhold the same from sale, lease, or other alienation, except as provided in this act."

This act is challenged for three reasons: First, that it was a delegation of legislative powers; second, it was indefinite, permitting the segregation when the commissioners "deemed" the land valuable for oil or gas; third, that it was repealed by the later act ordering the sale of the land.

There is a clear distinction between the delegation of power to make a law and the conferring of the authority to inquire into a state or condition upon which the law shall operate. Congress alone can pass legislation providing that bridges shall not be constructed over navigable rivers so as to interfere with commerce between the States. But Congress may authorize the Secretary of War to determine what rivers are navigable and what height above the water

the bridges shall be built so as not to interfere with the navigation.

In *Union Bridge Co. vs. U. S.*, 204 U. S. 364, it is said:

"Congress when enacting that navigation be free from unreasonable obstructions arising from bridges * * *. may, without violating the constitutional prohibition against delegation of legislative or judicial power, impose upon an executive officer the duty of ascertaining what particular cases come within the prescribed rule."

Again, Congress may pass tariff laws fixing the duties exacted, but providing that the rates shall not apply to nations admitting certain of our exports without taxation, and may authorize the executive department to determine what nations come within the exception. The executive does not legislate, but merely determines the fact upon which the legislation operates.

Field vs. Clarke, 143 U. S., 649.

Judge Sandborn, in *St. L. U. Bridge, etc., vs. The U. S.* 188 Fed., 191 said:

"A Legislature may delegate to an executive or administrative officer the power to find some fact or situation upon which the operation of the law is conditioned."

Justice Lurton, sitting on the Sixth Circuit, had occasion to examine this question in the case of *Coopersville C. Co. vs. Lemon*, 163 Fed., 145, and uses this language:

"That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear."

In re Kollock, 165 U. S., 526.

Dunlap vs, U. S., 173 U. S., 65.

It is proper to inquire what constitution prohibits the Oklahoma Legislature from conferring the power of determining what lands are mineral on the State Commissioners of Public Lands of Oklahoma. The Oklahoma State Constitution? If so, it has been construed by the Supreme Court of that State, and its construction would be accepted by this court. It is a state question and not properly reviewable in this court. The Supreme Court of Oklahoma, not only in the decision of this case below, but in other cases, has held that such legislation is not the unconstitutional delegation of legislative functions.

Insurance Co. vs. Welch, 49 Okla. 620.

The second objection is unsound. The word "deem" has the well-understood meaning when applied to administrative boards or judicial or quasi-judicial tribunals. It usually means "adjust" or "determine."

In the case of *Town of Checotah vs. Town of Eufaula*, 31 Oklahoma, 85, it is said:

"One meaning of 'deem' is to judge."

In *State vs. Cohen*, 73 N. H., 543, it is said:

“ ‘Deem’ does not signify an arbitrary exercise of will, but a deliberate exercise of judgment. To ‘deem’ is to think, judge, hold as an opinion, decide, or believe on consideration.”

The Federal courts frequently define the word “deemed” as the equivalent of “to adjudge.” *Leonard vs. Grant*, 5 Fed., 11, 16; *U. S. vs. Doherty*, 27 Fed., 730, 734.

The third objection is equally untenable. The segregation statute was passed at a time when no statute had been passed authorizing a sale. The Legislature was contemplating a sale because pending at that time, and passed (April 8, 1908) by the same Legislature, was a complete act providing for an appraisement. (See Appendix A to Sharp’s brief.)

The act of Congress required an appraisement before sale and the Legislature was providing an appraisement in order that certain of the lands might be sold. But in order to prevent its mineral land from being sold, and prior to the passage of any law permitting the same, the Legislature passed the Segregation Act, which required that the commissioners should segregate all lands known or deemed to be valuable for oil or gas. It was necessarily anticipating subsequent legislation directing a sale. When the sale was ordered by the Act of March 2, 1909, it was expressly provided that none of the lands should be sold that had been reserved by the Enabling Act or other acts of Congress or any act of the Legislature.

The Act of 1909, providing for the sale of public buildings land, was a part of the general plan of disposing of the public lands of Oklahoma. It adopted the appraisement previously made and recognized the rights conferred by the previous acts. It was intended to fit in and be a mere complement of the other legislation upon this subject. It was not intended in any sense to repeal the provisions with reference to the leasing of mineral lands. The proviso found in the first section, which prohibited the sale of lands known to be *mineral*, did not in any way attempt to provide for the leasing of such lands for the production of their *known* mineral. The Legislature had in mind that a complete system had been provided by the act of May 26, 1908, and, without any intention of modifying or repealing that statute, left the mineral lands to its operation.

However, we may again assert that whether the Act of May 26, 1908, was repealed by the Act of March 2, 1909, involves the construction of the Act of 1909.

The Supreme Court of Oklahoma has construed the Act of March 2, 1909, and held that it did not operate to repeal the provisions of the Act of May 26, 1908, known as the Segregation Act. This construction was necessary, in the decision of the court in the holding that the laws of Oklahoma authorized the segregation of the land in controversy deemed by the Commissioner to be valuable for oil and gas. This court, as we have frequently said, will accept that construction.

The provision with reference to segregation found in the first section of the act was one of practice, convenience, and notice. The first section did not in any sense limit the right of the State to the control of its oil and gas in its own lands, but it provided a method by which the lessees might know and the State might designate lands valuable for mineral purposes. The next section expressly shows that this is a correct construction, because it then required the State to make leases with the lessee for the surface of such lands reserved or segregated. There can be no contention that the State lost any of its minerals by mere delay in segregation, because it was the owner in fee and had the right to lease its land the same as any other owner in fee, at any time for mining purposes, but as some of the lands were to be ordered sold the State was withdrawing lands known or deemed valuable for oil and gas, and precluding the sale of such lands. Nor can it be contended that there was any particular time in which the order of segregation was required to be entered in the record of the Commissioners, because the statutes provided that *when* any tract is known, or *where* such lands are deemed valuable. *When*, in the sense that it was used there, followed by the verb *is* (in the present tense), means that whenever the knowledge is possessed. "When" used with reference to a fact, carries the continuing idea that when the present is moving by the passage of time, that the power is moving also by the passage of time. The word *where*, however, does not refer to time, but refers to the existence of certain circumstances. These circum-

stances may have existed yesterday and may exist today, or may come into existence at any time in the future.

Again, the expressions "when it is known" and "where it is deemed valuable," are expressions, when construed together, convey a distinct idea. 2nd Bouv. L. Dict., page 1227, defines *when* as "at the time." Then, the expression "when it is known" means "at the time that it is known." The expression "where deemed valuable," carries the idea "*if* deemed valuable," and has no reference to any limited time, and many cases can be found construing the words *if* and *where*, when relating to the existence of certain circumstances, as meaning substantially the same as *when* or *whenever*.

See *Campbell vs. Milliken*, 119 Fed., 982, 986.

In the case of *Swink vs. Anthony*, 107 Mo. App., 601; 81 S. W., 915, 916, the word *where* is construed in its application to circumstances that have, may or will occur, as meaning *if*.

In the case of *Ex Parte Boyd*, 50 Tex. Crim. Rep., 309; 96 S. W., 1079, 1080, **where** is construed, in an expression providing: "That where advisable in the opinion of the judge of the district court, etc," as meaning at the time when he may deem it advisable. This is exactly the sense in which the term is used in the statute we are considering. The statute says that at the time that the Commissioners may know or at the time when they may deem it valuable, the lands shall be segregated, and follows with the proviso

that leases shall then be made of only the surface. Then we have a grant of this land to the State, with absolute dominion over the same, with certain limitations as to the manner and price of sale, with the proviso, however, that mineral lands should not be sold for a fixed period of time, or such further time as the Legislature might prescribe.

We have an act of the Legislature of 1907-8 granting to the Commissioners of the Land Office the power and right to lease the land for oil and gas to the same extent and in the same manner as a private owner of land in fee might in his own right execute a grant to his land, with the additional provisos found in the first two sections, that at any time that it was known or deemed valuable, public notice should be given of their conclusions by entering in their record their finding, which automatically withdrew the land from sale and required all lessees to take notice of such condition. This power was further continued and this construction given further emphasis by the Legislature of 1917. Senate Bill No. 181, found in the Session Laws of the Sixth Legislature (1917), at page 462, in effect recodified the laws with reference to the leasing of public lands for oil and gas purposes. Section 1 of this act removed all uncertainty as to the construction to be given to these adverbs, by the following expression:

"The Commissioners of the Land Office are authorized to lease for oil and gas purposes any of the school or other lands owned by the State of Oklahoma which such Commissioners may deem valuable for oil or gas, etc."

This clause authorizes the withdrawal of such lands, without reference to the time when the Commissioners might deem the same valuable for oil and gas. It is also a Legislative construction of the former act, by showing that it did not consider the adverbs *when* and *where* found in the first act as being of such character as to exhaust the power of such Commissioners or limit the time in which they might act, to any particular period of time. Of course the words "the Commissioners are authorized to lease, etc.," are commands, in the sense that it is the master directing its officers what to do. If the second section of this act further recognized the idea by the following:

"The Commissioners are empowered to segregate any of the school or public lands for mineral purposes which the Commissioners may, in order entered of record, determine to be valuable for oil and gas."

The record in this case showing the segregation by proper resolution, and the execution of an oil and gas lease to the Magnolia Petroleum Company, the Magnolia Petroleum Company became vested with all of the right which any fee owner might give to operate upon his land for oil and gas, with the single proviso that the Magnolia Petroleum Company should pay the damages which were sustained to the surface by the agricultural lessee. This payment was offered in the petition and in Court, and was also offered at the time that the company made demand to go upon the property to locate its wells and commence its operations, but the defendants refused

to accept any compensation and refused to permit the Magnolia or its agents and employees to enter upon the same.

The brief of plaintiffs in error admit the order of segregation, admit the execution of the lease and admit that the plaintiff had refused to permit any development of the property, and allege as the excuse therefor that it would be in effect the denuding of the said land of its valuable mineral and depriving the plaintiffs of what they termed their right and title to the property.

This court, in the case of *Roma Oil Company vs. Long, supra*, has decided every question that can be reasonably urged by the plaintiffs in this case, adverse to their contentions. The first paragraph of the syllabus is as follows :

"In leasing school lands of the State for agricultural purposes, the State reserves to itself, its lessees and grantees under section 7196, Rev. L. of 1910, the right of entry to drill and operate oil and gas wells on said premises."

In the body of this opinion is found the following statement:

"The question for consideration is whether the oil company had the right to enter without the consent of the surface lessee and proceed to develop the premises under an oil and gas mining lease."

Discussing this matter further, the court said:

"Section 7196 expressly provides that agricultural leases of any surface interest in such

segregated lands shall reserve to the State, its lessees and assignees, the right to enter and drill and operate oil and gas wells. This severance is complete for all legal and practical purposes, and this act was in effect when the lease under which Long claims was entered into by the Commissioners of the Land Office. Being the law of the State, this reservation became part of the lease at the time of its execution. The lessees made their contracts with a common lessor, one taking the surface right, the other the right to prospect and develop oil and gas."

Further on it is said :

"Long had possession of the surface for agricultural purposes only. The right to enter and prospect for oil and gas was reserved to his lessor by statute. The oil company, as a lessee of the State, had the right of way to enter and prospect under section 7196 of the statute.

* * * This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary; but, subject to this limitation, it is a right growing out of the leases made by the common grantor and the impossibility of reaching the oil and gas in any other manner."

The opinion then holds that the mineral lessee had the right to go upon the land and use so much of the land as might be necessary, and in case settlement had not been made, that he could only be enjoined when it was alleged that he was insolvent, or there existed other reasons which gave the court of equity jurisdiction in the matter. None of these

matters were alleged or claimed, and the injunction sought to take only such part of the land as was absolutely necessary, in order that the Magnolia Petroleum Company might enter upon the land and drill wells. The plaintiffs do not pretend to assert that the Magnolia are attempting any unreasonable appropriation of the land for such purposes, but deny that the Magnolia has any right to enter upon the land, or that the State had any right to make any lease upon the land.

We think the Segregation Act is entirely valid, and the overstrained argument against the validity by the plaintiffs in error adds to our conviction. But it would be immaterial whether the statute was valid or not. Under the Enabling Act the condition precedent to the State conveying this land to the agricultural lessee was, that after the obtaining of a high bid in a public sale duly advertised, such lessee must exercise his election to accept same. If the law be held invalid, which prevented the obtaining of such high bid, which would of itself prevent the lessee from making an election, title would not pass to the lessee. A condition precedent, whether valid or invalid, must be performed before title passes. If the condition precedent is prevented, even by an unlawful act, title does not pass.

Blackstone in his Commentaries, in book 2, page 157, states the rule as follows:

“But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome

in a day, he shall have an estate in fee, here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed."

In 4 Kent, page 125, the rule is stated as follows:

"A precedent condition is one which must take place before the estate can vest or be enlarged; as if a lease made to B. for a year, to commence from the first day of May thereafter, upon condition that B. pay a certain sum of money within the time, or if an estate for life be limited to A. upon his marriage with B., here the payment of the money in one case and the marriage in the other are precedent conditions, and, until the condition be performed, the estate cannot be claimed or vest. Precedent conditions must be literally performed, and even a court of chancery will never vest an estate, when, by reason of a condition precedent, it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed."

See also *Wellsville Oil Co. vs. Miller*, 44 Okla. 493 where the question is fully discussed.

We have not attempted to follow counsel in their labored discussion commencing at page 112, Sharp's brief, and concluding at page 121, in which they discuss our brief on motion to dismiss the appeal. Their statements are conflicting and incoherent, and are fully answered by merely reading the same.

At page 122, Sharp's brief, counsel commence the discussion of the term found in the Enabling Act, "of land valuable for mineral," and throughout several pages attempt to show that the land should be valuable for minerals at the time of the passage of the act, and that it was necessary that such minerals, or their value, be known at that time. A few cases are cited to support their argument which are wholly irrelevant. The cases cited are to the effect that if Congress or the Legislature authorizes the *selling of property*, but reserves lands valuable for mineral, and the Land Department makes selections of certain known mineral lands and directs a sale of the remainder, that title passes to those sold notwithstanding the same may subsequently be discovered to contain mineral. It would require no decision to establish this rule; or, else no sale of lands could ever be made.

If A. owns a piece of land and sells it to B., the rights to the land pass to B., notwithstanding the same may be valuable for mineral, and A. would not have sold the same had he known they were valuable for such purpose. If upon the other hand A. refuses to sell the land because he believes or even "deems" such land to be valuable for mineral, B. gets no right notwithstanding the same may ultimately prove to have no value. The decisions are to the effect that the Commissioners must make the selection before the sale, and refuse to sell.

The Secretary of Interior has been authorized in a great many cases to withdraw land from homestead

and preemption laws. Congress pass acts providing that certain lands may be withdrawn from settlement because of their value for the preservation of timber, or because they are valuable for mineral purposes, or because they are needed for park or other public purpose, and direct the Secretary of Interior to make the necessary investigation to determine what lands are necessary for such purpose and to withdraw the same from settlement and sale.

If the Secretary withdraws a tract of land and refuses to sell because desired, or valuable for any of these purposes, the settler cannot acquire rights to this land. If the Secretary's action in the matter is unlawful or unauthorized, he may be compelled by mandamus to sell same, though we know of no instance where the discretion of the Secretary in this regard has ever been reviewed by the courts. But whether his act be lawful or unlawful, title does not pass to the land without a sale. If, however, the Secretary determines that a certain tract of land is not valuable for mineral and sells the same, title passes to the land and the mineral rights become vested in such purchaser. It is immaterial that the Secretary discovers that the land is valuable for mineral, unless, after such discovery, the land is reserved from sale.

It therefore seems entirely inappropriate to cite cases which merely hold that when the Secretary has sold land without any reservation of mineral, that he cannot afterwards claim that because such

land has proven to be valuable for minerals that the sale is void.

Counsel, at page 137, Sharp's Brief, referring to the decision of the Supreme Court, say:

"The opinion held out words of hope in virtuous language, and delivered destruction in its decision and order."

It requires but very little effort to give "hope" to these plaintiffs. Wherever this court, or any other court, in construing a state of facts, however different, have decided that the owner was required to make the conveyance, counsel have considered same a precedent and have attempted to distort every feature of this case to give it some likeness to those decided by the courts; but the line of demarkation has been so clearly stated, and so often repeated, that an owner can only be deprived of his land by a sale or contract of sale, that it would seem that hope would cease to abide eternally in their breasts.

At page 137, Sharp's Brief, counsel finally state the crux of plaintiffs' case by the statement that the Segregation Statute was passed May 26, 1908, and the Sale Statute passed March 2, 1909, and then says:

"The two statutes cannot coexist."

And on the following page say:

"Hence this case presents a question of the constitutionality of the Segregation Statute."

We must assume that they meant constitutional under the Constitution of Oklahoma. At the time the

Segregation Statute was passed the Sale Statute which they referred to had not been enacted. They admit that the State did not have to sell, and, if that, was true, undoubtedly they must also admit that the State was permitted to lease for mineral. If the State had not elected to sell at that time and passed a law directing the leasing for mineral, we hardly see how they could look the court in the face and say such leasing act, which is the Segregation Statute, was invalid and, if invalid, undoubtedly did not conflict with any act of Congress and would be invalid only because in violation of the Constitution of Oklahoma.

The State court in construing the Segregation Act and holding that the same was not unconstitutional, and was not in conflict with any other act of the Legislature, and was in all respects operative and binding, would be construing a State statute and State laws, and its construction will be accepted in this court. Of course, everywhere it is stated by counsel that everything done or said by the State of Oklahoma, or its officers, or its courts, is unconstitutional and in conflict with the acts of Congress. But we take it that merely calling an Airdale a cur will not change the nature or temperament of the dog.

Counsel's legal conclusions in this regard are mere epithets, and at no time or place have they submitted any rule that would appeal to any reasonable mind; and we again repeat that no Federal question is reasonably presented and the appeal ought to be dismissed. We have repeated this expression probably too often, but almost every page of counsel's brief finally returns to

the construction of a State law, and shows they are merely trying to get this court to review the decision of the Supreme Court of the State in the interpretation of State laws. As a matter of fact we would have no objection. The claim of the agricultural lessee was presented in nearly every District Court of the State, and counsel were able to find only one man on the judiciary of the State who could agree with them, and the decision of that court was reversed by an unanimous opinion of the court with nine judges sitting. The statement that the Supreme Court of the State attempted to avoid an appeal to the Federal court by evasions and quibbles is wholly unwarranted, and we are surprised to find the name of some eminent lawyers signed to their brief.

Counsel in both briefs contend that the preference right is a valuable right and, therefore, a vested right. The question is rather academic in this case. A "preference right" never becomes a right until a sale is made, and even though it should be held to be a vested right, it would be a right that would only vest *at the time of the sale*. Counsel reach this conclusion by an analysis of two cases from Oklahoma, which when understood are not in point.

The case of *Noel vs. Barrett*, 18 Okla., 304, did hold that a preference right was a right of such value that it would sustain the consideration for a note. The preference right referred to, however, was one to renew a lease. The preference right to lease, being considered, was one existing at the time and gave to the holder of the lease a right to renew the existing lease,

while in the case at bar the right to purchase is one that never comes into operation *unless the property is sold*. But it must be kept clearly in mind that a *right may be valuable and yet may not be a vested right*. A vested right is defined in words and phrases as follows:

"A vested right is defined to be an important fixed right to present or future enjoyment, or where the interest does not depend on a period or an event that is uncertain."

It was said in *Richardson vs. Aiken*, 87 Ill., 138, quoting Cooley on Constitutional Limitations, 359, that a right cannot be considered as vested unless it is something more than a mere expectation and already is a title, legal or equitable.

In the case of *Steers vs. Kinsey*, 68 Ark., 360, it is said:

"A vested right, to be within the protection of the constitution against interference therewith, must be something more than a mere expectation, based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, in the present or future enjoyment of property in some way or another."

In the case of *Graham vs. Great Falls W. P. & T. Co.*, 30 Mont., 365, it is said:

"When the phrase, 'a vested right' or 'a vested interest,' is used in other relations, it may, with reasonable precision, be held to mean some right or interest in property that has become fixed or set, and is no longer open to doubt or controversy."

A doubt or condition exists when it is uncertain whether property will be sold, or whether lessee will accept or take it at the highest bid. There are many valuable rights that are not vested rights. All of our political rights are valuable but are not vested rights. A vested right as used in the constitutional construction, requires an existing present interest, and when used with reference to property, means a present existing title or interest in the property.

From the very nature of things, the preference right given by the Enabling Act, is not a vested right or property right. If it is a vested right, the lessee is the owner of an interest in the property. The statute, however, provides that it shall be offered for sale to the highest bidder, provided, however, that the lessee may offer the amount of the highest bid and shall be permitted to take the land. To say that he has an interest by reason of such a law, when it is impossible to determine whether he will be the lessee when the sale is made or whether he will be willing to pay the amount offered by the highest bidder, or whether he can pay such an amount, would be a disregard of the essential elements of a vested right. Again, he may ~~not~~ have the right, because the land may never be sold. He does not have such right except *at the time of the sale*. There is no law requiring it to be sold, so that it can never be determined whether the sale will be made, and he, therefore can have no vested interest in the property that may never be sold.

Clark vs. Frazier, 177 Pac., 589 (Okla.), is cited

by counsel and some inaccurate language is used by Commissioner Hooker in that opinion.

An examination, however, of the facts shows that the statement was not used with reference to a preference right as contended by counsel for plaintiffs in error. In this case one Mott, a school land lessee, died, leaving certain heirs. His heirs took the lease to the property in the name of one of the heirs and improved the property. The land was advertised for sale, and the heirs got together and agreed that Ella Frazier, one of their number, should attend the sale and buy in property for all the heirs. She induced the others to remain away by fraud, and attended the sale, herself, and purchased the land in her own name. It was alleged, further, that she paid for it with the property of the heirs by taking the money from the estate of Mott. *There was no question involved as to the preference right.* Under the law a trust resulted, as the consideration for the purchase was made from the money and property of the heirs. Besides, the law of constructive trust applied. Ella Frazier had by fraud kept the other heirs from attending the sale to protect their rights, and had, herself, promised that she would buy it for the use of the estate. Her fraud created a constructive trust. There was no preference right involved when the suit was brought, because the preference right had been exercised by the purchase of the property, but Hooker did use the expression that: "A holder of school land certificate, having a preference right to buy the land, has an equitable estate in the option." The school land certificate referred to was

not a lease, but was a certificate issued by the Secretary of the Board showing that a purchase had been made. A holder of such a certificate was in effect a holder of the title to the property. There is, in fact, no preference right to buy given in such a certificate, because it is a certificate that a sale has been made. The expression found later in the opinion, in which Hooker says that a preference right is in legal effect an option, is not only dictum, but is unsound. It is in no sense an option. It is not in legal effect an option. An option necessarily must be limited as to time and have many other limitations that have no application to the preference right. An option to buy is a present, existing right, while a preference right is one that may never come into operation.

At page 139 of the Sharp brief, it is suggested that the Commissioners of the Land Office were derelict in their duties by not selecting other portions of the land and segregating the same for mineral purposes. Counsel has volunteered the opinion that other sections are even richer in oils than the section involved in this action, and that it is the duty of the State officers to recover such lands. If they had discriminated the cases which they have cited, the State officers would be entirely vindicated. *If they do discover* the oil and gas value before the sale, the Commissioners must withhold the land from sale. But if they sell the land prior to such discovery, the fee passes to the purchaser and the lands cannot be recovered. All the cases which they have cited sustain this view, and only this view.

At the bottom of page 139, they have answered their haggling over the proper construction to be given to the words "known to have mineral" and "deemed to be valuable for mineral." Counsel, referring to the opinion of the court, says:

"The opinion further credits them (the Commissioners) with the power of divination, for it says, 'they were apprised of the oil values of the land.' This we think the first instance in history, and we dislike to doubt it, but we must. We think this must be credited to the enthusiasm of authorship and can hardly be assigned as error of law, as no one is apprised of oil until he finds it with the bit."

If counsel be correct in these conclusions, then no land could be segregated, because nobody could ever know that the same was valuable for oil until oil was being produced. The State would have had to have gone out and drilled a well upon every acre of its land in order to have ascertained that the same contained oil or gas. The very folly of this suggestion is its answer. The law only required them to use their best judgment—that is, to "deem" that it was valuable for oil, and upon such judgment to segregate the same.

The same error is carried forward on page 140 in the following inquiry by counsel:

"But if the Commissioners could so duly segregate from sale one tract of the granted lands on 'supposition' they could duly segregate from sale two tracts, an hundred tracts—all of it. In which case what becomes of the provision of the Ena-

bling Act granting lessees the right of purchase at the highest bid?"

Nothing would become of the provision. It would remain as it is now remaining, contingent upon the sale being ordered by the State. The State might have withheld all of its lands from sale without infringing any of the provisions of the Enabling Act.

Injunction.

At page 145 of the Sharp' Brief, and page 138 of Judge Boys' Brief, it is urged that the court erroneously issued an injunction in the case for the reason that the injunction would not be the proper remedy. It is suggested in the Sharp Brief that the injunction in Oklahoma is a preventive remedy and not an assertive one. If this is true it would be the construction of the Practice Act of Oklahoma, and we feel that we may safely assume that this court will not re-examine a decision upon the civil procedure of our State. It was, however, the fixed practice in Oklahoma that an injunction could be granted in a case of this character. It had been previously held by the Supreme Court of the State, in *Roma Oil Co. vs. Long*, *supra*, that injunction was the proper remedy.

Analysis of Boys' Brief.

Judge Boys has filed a separate brief. His theory is presented in a more connected way than that presented by the other gentlemen in this case. For this

reason, however, it is easier to answer because we can point out the weakness of each link in his chain of argument.

His theory, briefly stated, is as follows: That by the provisions of section 36 of the Act of March 3, 1891 (26 Stats. at Large, 1043), certain lands were reserved in the Territory of Oklahoma for school purposes, and it was provided that the same might be leased for a period not exceeding three years for the benefit of the school fund of the said Territory, by the Governor under regulations to be prescribed by the Secretary of the Interior. Thereafter, the Secretary of the Interior, acting under and by virtue of the provisions of this act, promulgated certain rules. Rule No. 8 provided, "in case a new lease is to be made at the end of three years, the preference should be given to the former lessee, if the Governor finds that he cultivated the land in a business-like manner, and fulfilled the terms of the lease in good faith."

On the 4th day of May, 1894, Congress by an Act (28 Stats. at Large, 71) ratified certain reservations that had been made by the President, and provided that section thirty-three in each township should be reversed for public building purposes, and should be leased under such rules and regulations as might thereafter be prescribed by the Legislature of Oklahoma Territory, but that until such legislative action, the Governor, Secretary of the Territory and Superintendent of Public Instruction, should constitute a board and lease such lands under the rules theretofore prescribed by the Secretary of the Interior.

This condition continued on until the passage of the Enabling Act by Congress. As we have shown, section 10 of the Enabling Act provided that the lands should be leased until sold under rules and regulations to be prescribed by the legislature of the State, but that until such legislative action they should be leased under the existing rules and regulations. The existing rules and regulations were the same rules that had been adopted by the Secretary of the Interior in the early formation of the Territory.

Counsel then asserts that these acts of Congress gave to the agricultural lessee the right to possession in perpetuity. He contends that if A executes a lease to B for the term of three years, with a provision that if he desires to re-lease it at the end of three years, and he can satisfy A that he has farmed the property satisfactorily, and has acted in good faith, that he will re-lease it for another term—That A loses in perpetuity his right to that land and B acquires in perpetuity the right to possess and enjoy the same.

The mere statement of this proposition shows to our minds its fallacy. Something more definite is required to effect a transfer of the legal title to the property. A has not agreed to release it at all, and may decide at the end of three years that he will not release it. B has not agreed to take it, and may not take it at the expiration of the first term, and if he desired to take it, he might be wholly unable to satisfy A that he had farmed the same satisfactorily, or acted in good faith.

Counsel attached to this preference right to release a clause giving the lessee the preference to buy if the same is sold, and thereupon asserts that the lessee became not only entitled to enjoy the possession in perpetuity, but vested with the legal title to the property, which he thinks ought to be quieted by the judgment of this court. He apparently overlooks that even the "existing rules," were changed because the same authority that attempted to make the "existing rules" the law, provided that they should only continue until such time as the legislature should otherwise prescribe.

On pages 76 and 77 of his brief, counsel gives two sections of two different statutes passed on the 26th day of May, 1908, showing that the Legislature had at one time prescribed different rules. At page 76 he quotes from the act of 1907 and 1908, passed May 26, 1908, which expressly stated that mineral lands should be segregated and reserved from sale until the year 1915, and for such additional period of time as may be determined by law. He also quotes from the Segregation Act showing that it had been determined by law to segregate the same from sale, lease, or other alienation without any restriction as to time. The two acts passed the same day relate to different subjects and therefore will not be held to conflict.

At page 86, he suggests that the words in section 8 of the Enabling Act, prohibiting the sale of any of the lands where same are valuable for minerals, denoted that it must, at the time of the passage of the act, have been known to be valuable for

minerals, or such lands were not withheld. He reaches the conclusion by insisting that any other construction would destroy the preference right provision of the Enabling Act. The preference right was, however, only the right to purchase at the highest bid at the time of the sale, and if certain lands were designated under a law prohibiting the sale, then the preference right was not destroyed; but it never came into existence. The Enabling Act itself expressly stated that until the lands were sold no preference right of purchase could be operative.

Counsel is certainly right in his conclusion that the mineral clause found in paragraph 8 of the Enabling Act only extended to the period ending January 1, 1915, and the State after that time had the right of sale whether mineral or not. This is true, and exactly what the act says, but the State also had the right not to sell after January 1, 1915, and long prior to that date exercised its option not to sell by the passage of the segregation law.

Counsel says, at page 90, could it be said that the preference right to buy land, and all of it, including the mineral, was first in Price; then, perhaps, ten years afterwards, by reason of some local oil flurry, etc., a lease could be sold, and that during such time Price would be deprived of his preference right, but when the flurry was over, Price would again have such right, and this could be extended indefinitely. Counsel is exactly right. Price never had any preference right until the sale was made and the high bid received. If

ten or twenty years after an oil flurry had subsided, or the oil had been removed from the premises, Price might have the preference right to buy, if he was at the time the agricultural lessee in possession.

Counsel then discusses the necessity of knowing that the land was valuable for minerals before the segregation, and he cites the same cases which we have reviewed in the brief by Sharp, stating the rule that if the land is sold and legal title passes, the grantee takes both the surface and the minerals. In those same cases we have shown it is held, that if the land is not sold neither the surface nor mineral passes, and in the case at bar the surface was not sold.

We are not admitting, though it is immaterial to this case, that the Legislature was required to lease the land at all. The Legislature might have selected one of these sections and built on it their State capitol or other public buildings. The land would have been devoted to the purpose which Congress required, and the act of the Legislature in selecting and designating such tract would have been the rules and regulations referred to in the act of Congress, and have thereby presented any lessee having any right to ever buy the land if same was sold.

The whole claim of the agriculture lessee is such fine cobweb, when measured by legal principles, that we are certain that no decree can ever be entered giving title to such lessee until the State shall have sold the same, received the high bid, and

the lessee has elected to take the same at the high bid.

At page 107 Mr. Boys has suggested, though perhaps he does not definitely state it, that the Commissioners of the Land Office approved the appraisalment and thereby exercised their power of declaring the land mineral because the appraisalment showed it was not mineral. Counsel's quotation from the appraisalment is so incomplete as to give a false impression. He quotes the questions and answers numbered 9 and 10, which are found on page 140 of the printed record. He should have quoted 8 to have made the matter referred to intelligent. Question 8 in the appraisalment reads as follows:

"Have stone quarries, sand or cement beds been opened?"

The answer was:

"No."

It was followed then by questions 9 and 10, which counsel quotes, and which reads as follows:

"9. Any gypsum, cement, salt, mineral, gas or oil? No."

"10. Is land adjacent to mineral, gas or oil production? No."

It is obvious that there is no verb in question 9, and being a part of question 8, we would look to it to obtain the verb. Then question 9, in effect, inquires:

"Has any gypsum, cement, salt, mineral, gas or oil bed been opened?"

And section 10 asks if the land is adjacent to open beds or production.

The appraisers were merely sent out under the law to view the lands, and they reported what they found upon the surface of the land. They reported the amount of land in cultivation; how same was situated with reference to hills, rivers, timber or prairie; how much of the land was stony; what buildings had been erected upon it, and how much land placed in cultivation, and the distance to markets, public roads and railroads. They were not expected to make geological investigations, and not required to make a geological report, and the Commissioner approved the report but not the facts stated in the report. The Commissioners had no way of determining whether the report was true or false except that from the location of the property and its general description they might be able to fix the valuation of the same.

This construction is obviously correct, because the land was reappraised at \$2,500 on the 30th day of August, 1915, although the Commissioners had previously, on the 20th of August, 1915, segregated the same because it was valuable for oil and gas. The Commissioners obviously did not understand that because the appraisement disclosed that there was no oil production upon the property, that they were without power to make the segregation. We have shown that the Legislature did not intend that the

exercise of the power should divest the Commissioners of any further power of segregation because they pass another act in 1917, conferring upon the Commissioners the power to segregate the oil and gas land. If counsel is right that the segregation could only have been made as of the time of the passage of the Enabling Act, and the Commissioners had lost their power to segregate by the approval of the appraisements, the later law would have been useless.

Counsel in both briefs have discussed the question of whether or not the Commissioners of the Land Office could by contract limit the rights of Price. The Commissioners of the Land Office could not limit Price's right except so far as such limitations were imposed or authorized by the Legislature, but the Legislature, in the Segregation Act, had expressly authorized the Commissioners to lease ~~only~~ the surface, and to reserve the right to mineral, and the right of ingress and egress to mine and remove the mineral. This Segregation Act gave him no right to renew his lease. True, Price was not required to join in the execution of a lease for the surface only. He could vacate the land, and under the other laws of the State, have removed his improvements, but whether he did so or not, the rules and regulations so prescribed by the Legislature gave no right to any renewal of his lease, and the Land Department properly struck out of the surface form of lease the provision giving him the right to release the land.

It is very difficult, of course, to follow counsel

in his contention that the Segregation Act, or the action of the Commissioners in segregating the land, impaired any contract. The Legislature was permitted to pass rules and regulations governing the leasing, and they provided, among one of the rules, that if the same were deemed valuable for oil and gas, that it should be leased under the special provisions of that act. How any contract then could be impaired we are incapable of understanding.

Mr. Boys, however, suggests that the Act of 1909 repealed these statutes. He says, at page 109, that:

"The Act of 1909 created the contractual relation between the defendant Price and the State, and any subsequent legislation could not affect their right, and would impair the obligation of contract."

As there was no subsequent legislation, no contract would be impaired. The legislation which he is referring to had been previously passed, and under those regulations the State had permanently withheld from sale mineral lands, which included the land involved in this action.

Mr. Boys then discussed at some length the proposition that an oil and gas lease gives an interest in real estate, but that is too far afield for us to go. It matters not whether an oil and gas lease gives an interest in the fee or not, so far as Price is concerned. The State owned the land and could give an oil and gas lease, whatever interest it may have carried, and Price,

who did not own the land and no interest in the land, and whose possession could be terminated at any time, could not complain of the action of the State in giving such lease.

Mr. Boys is a little more astute in presenting the questions which we have argued, referring to the right of the Legislature to delegate legislative power to the Board. He evidently recognized that that was a State question that could not be presented to this court, but he suggests that such delegation violated the provisions of the Enabling Act. He, however, has not presented that phase of the question at all, but has merely presented the question whether or not under the constitutions of the several States can legislative functions be delegated. We think the legislative functions cannot be delegated, but we have shown that the Legislature, having expressly prohibited the sale of the land, when a board investigates and determines that same are valuable for minerals, it is not a delegation of legislative power.

Counsel, commencing at page 140, has reviewed the case of *Frisbie vs. Whitney*, 9 Wall., 187, and also the case of *Hutchings vs. Low*, 15 Wall., 77, known as the Yosemite Valley case. His attempt to show that these decisions, holding that a preference right is not a vested right, in fact is not a right against the Government at all, but merely a right to be preferred to other purchasers, are not in point in this case. He again cites *Lytle vs. Arkansas*, 9 Howard, 314. However, the principle of *Lytle vs. Arkansas*, *supra*, is fully

explained in *Hutchins vs. Low, supra*, and we cannot see how its application can be misapplied.

Supreme Court Decisions.

Counsel in both briefs discuss the opinion of the Supreme Court, and both seem to think that the court overlooked their arguments. An examination of the opinion by the Supreme Court discloses that every question here presented was decided, although not stated in detail. The court held expressly that under the rules adopted by the Secretary of the Interior, the right to re-lease was subject to the power of the State to make other disposition of the land. In fact, other disposition was the exercise of the conditions stated in the rule, which stated that in case the land was leased, the lessee might renew his lease; that the court further held that the State segregated the land and thereby elected not to lease the same, but provided that the surface might be leased subject to entirely different conditions. The conditions were that the tenant should be paid for the improvements that were injured by the mining lessee, and as the land was withheld from sale, he had no preference right to buy, or his preference right to buy did not come into operation. The court further held that the State, being the owner, had the right to lease its land for mining purposes, and had leased this land under its power to the Magnolia Petroleum Co., and that the Magnolia Petroleum Co. was entitled to enter upon the premises, develop and operate the same for oil and gas, and was required to pay to the State the royalty exacted by its lease,

and enjoined Price from interfering with the exercise of those rights.

We think that after a full investigation of this question it will appear that counsel are complaining primarily about the action of the State in the passage of laws which they think were not beneficial to Price, and also complain of the construction of such laws by the Supreme Court of the State. No right of Price at any time had been prejudiced or disregarded. Price never had any right to this land. He had the mere right of re-leasing the same if the State desired to re-lease it, and if he satisfied the State that he was a proper tenant. The State, however, decided not to lease it generally, but to only lease the surface, restricted so as not to interfere with the production of oil or gas. Price accepted this condition and entered into a new lease in which he expressly stipulated that he was not interested in any of the minerals, would not interfere with such mineral rights, and was leasing the same solely for the purpose of agriculture. The State, exercising its right of ownership, then advertised and sold a mining lease upon the land. Counsel contended that the State had no right to sell a mining lease because it had passed an act authorizing the sale of certain lands, and that the provision with reference to the mining lease was thereby repealed. That, however, cannot be a Federal question and cannot be reviewed in this court. But if the same is reviewed, the same conclusion will be reached, in our judgment, that was reached by the lower court.

It seems to us that the cardinal principle to be

applied is that the State owned the land subject to some slight limitations, and in exercise of its rights of ownership, leased it for oil and gas, and its surface for agricultural purposes. Every landowner has this right. Price can only become the owner of this land, if he is the agricultural lessee at the time of the sale, by taking the land at the highest bid, but that can never occur until a sale has been made.

When counsel agree that the act of Congress did not direct a sale but lodged with the State the right to either hold or sell, they must then look to the laws of the State to determine Price's right, and when we look to such laws, we accept the construction given those laws by the highest court of that State, and measure the lessee's rights by such laws.

It seems to us absolutely frivolous to say that the right of one man to buy a piece of land is impaired by an act of the Legislature passed a year previous to his acquiring such right; that is, that a contract can be impaired by the act of a Legislature passed before making the contract. We understand the law to be that the laws enter into and become a part of the contract, and whatever right Price had will be governed by the existing laws.

We therefore respectfully submit that this cause ought to be dismissed and the judgment of the court below affirmed.

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ERROR to a judgment of the Supreme Court of Oklahoma reversing a decree in favor of the plaintiffs in error, Price and wife, in a suit brought by the Petroleum Company to enjoin them from interfering with its operations under an oil and gas lease on land covered by a prior agricultural lease to Price. The State intervened to assert its ownership of the land and uphold the oil and gas lease.

Mr. E. E. Blake, with whom *Messrs. J. F. Sharp, C. B. Stuart, M. K. Cruce*, and *W. C. Stevens* were on the brief, for plaintiffs in error.

Messrs. B. B. Blakeney, George E. Merritt and *A. T. Boys*, for defendants in error. *Messrs. George F. Short*, Attorney General of the State of Oklahoma, *C. W. King*, Assistant Attorney General, *W. H. Francis* and *Herbert Ambrister* were also on the brief.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The subject matter of this controversy is a tract of land held by the State of Oklahoma as part of its public land, on which it made two leases: the first an agricultural lease to William T. Price; the second an oil and gas lease to the Magnolia Petroleum Co. The Magnolia Company brought a suit in equity in a district court of the State to enjoin Price and wife from interfering with its operations under the oil and gas lease. They made defense, alleging that the oil and gas lease was invalid and impaired their preference right under the agricultural lease to purchase the entire tract, including the oil and gas therein. The State, as intervener, asserted its ownership of the land and the validity of the oil and gas lease. The District Court, on final hearing, entered a decree in favor of Price and wife. This was reversed by the Su-

preme Court of Oklahoma, which adjudged and decreed that the oil and gas lease to the Magnolia Company was valid, and that Price and wife be perpetually enjoined from interfering with its operations. 86 Okla. 105.

The federal questions presented rest, in substance, upon the contention that as applied in this case the Oklahoma acts under which the gas and oil lease to the Magnolia Company was executed, deprived Price, as the agricultural lessee, of a preference right to purchase the land in its entirety, vested in him by the Oklahoma Enabling Act of 1906.

The tract in controversy is a quarter of a section numbered 33 lying within the lands formerly included in the Territory of Oklahoma that were opened to settlement by an Act of June 6, 1900.¹ This Act provided that sections 13 and 33 in each township should not be subject to entry, but should be "reserved" for "university, agricultural colleges, normal schools and public buildings of the Territory and future State of Oklahoma."

Prior to statehood the Territorial Leasing Board made short term agricultural leases on these reserved lands, with preference rights of re-leasing.²

The Enabling Act of June 16, 1906,³ by § 7 and § 8, granted to the State, upon its admission, sections 13, 16 and 36 in the several townships of the Territory of Oklahoma, for the use and benefit of universities, colleges and schools, as therein specified.

By § 8 it was provided that sections 33 theretofore reserved for charitable and penal institutions and public buildings, should "be apportioned and disposed of as the legislature of said State may prescribe"; and, further, that "Where any . . . of the lands granted by this Act to the State . . . are valuable for minerals,"

¹ 31 Stat. 672, c. 813, § 6.

² Act of May 4, 1894, c. 68, 28 Stat. 71.

³ 34 Stat. 267, c. 3335.

including gas and oil, they should not be sold by the State before January 1, 1915, but might be leased for periods not exceeding five years, at a fixed royalty in addition to any bonus offered, "Provided, however, That agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest therein by reason of such mining operations."

By § 10 it was provided that "said sections thirteen and thirty-three, aforesaid, if sold, may be appraised and sold at public sale . . . under such rules and regulations as the legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands, may be leased for periods of not more than five years . . . : *Provided*, That before any of the said lands shall be sold . . . the said lands and the improvements thereon shall be appraised by three disinterested appraisers . . . and in case the leaseholder does not become the purchaser, the purchaser at said sale shall . . . pay to . . . the leaseholder the appraised value of said improvements, and to the State the amount bid for the said lands, exclusive of the appraised value of improvements."

The terms and conditions of the Enabling Act were accepted by the State of Oklahoma by an "irrevocable" ordinance. *Coyle v. Oklahoma*, 221 U. S. 559, 564; *Sperry Oil Co. v. Chisholm*, 264 U. S. 488, 493. And the State by its constitution accepted all grants of land made by the United States under the Act, "for the uses and purposes and upon the conditions, and under the limitations for which the same are granted."⁴

The state constitution placed the sale and rental of the public lands in charge of Commissioners of the Land Office.⁵ By subsequent acts of the legislature it was pro-

⁴Art. XI, § 1.

⁵Art. VI, § 32.

vided: That the Commissioners should have an appraisal made of all lands granted the State for educational and public building purposes, showing the value of the lands and of the improvements thereon, and the names of the lessees occupying them;⁶ that when any tract of the public lands was known or deemed by the Commissioners to contain oil or gas or to be valuable for such purposes, they should segregate the oil and gas deposits from the surface use and interest, thereby withdrawing the land from sale until they terminated such segregation, and might separately lease the oil and gas interest therein;⁷ that the Commissioners should sell certain of the public lands, including sections 33 granted to the State for charitable institutions and penal buildings, at public auction, at which any lessee holding a lease thereon should "have the preference right to purchase" at the highest bid;⁸ and that the reserved lands whose proceeds were to be used for penal, charitable and public buildings, should be leased until sold as provided by law.⁹

Oklahoma was admitted as a State in November, 1907.¹⁰ The quarter section in controversy was not known then or for many years thereafter as oil and gas land. It was then held by one Click under an agricultural lease from the Territorial Leasing Board to January 1, 1908, with "a preference right" of re-leasing. This right of re-leasing was not questioned by the State. The lease was extended for two successive years, first under a general statute,¹¹ and then under rules of the

⁶ Laws, 1907-8, c. 49, art. 2, p. 484.

⁷ Laws, 1907-8, c. 49, art. 4, p. 490; modified in immaterial respects, by Laws, 1917, c. 253, p. 462.

⁸ Laws, 1909, c. 28, art. 2, p. 448.

⁹ Laws, 1909, c. 28, art. 1, p. 440.

¹⁰ Proclamation of the President, Nov. 16, 1907, 35 Stat. pt. 2, p. 2160.

¹¹ Laws, 1907-8, c. 49, art. 2, p. 484.

Commissioners. In January, 1909, the land and the improvements thereon were appraised. In October, Price purchased the interest of the lessee. After January 1, 1910, he continued to occupy the land and pay rentals thereon to the Commissioners, and was recognized by them as the lessee. In 1911, the Commissioners, after advertisement, sold at public sale the three other quarters of the same section 33, and other public lands in the vicinity. There is evidence that Price appeared at this sale and requested the officers in charge to sell his quarter section also, and that this was refused, the reason given being that it had not been advertised. There is no evidence that he thereafter requested, at any time, that a sale be made of this quarter section.

In 1913, the Commissioners leased Price this quarter section, for agricultural and grazing purposes, until December 31, 1914. The lease recited that it was subject to the right of the State to sell the land at any time and that, upon such sale, Price, as lessee of the land, should be entitled to purchase the same at the highest bid, subject to the conditions provided by law; and also provided that he should have "the preference right" to re-lease the land as provided by the laws of the State. This lease was subsequently extended for one year; and thereafter Price, without any formal extension or renewals of the lease, continued in possession of the premises and paid rentals to the Commissioners, and was in such possession, holding over as the agricultural lessee recognized by the Commissioners at the time this suit was commenced. His status as a lessee has not been questioned in any way, and the case has been tried by all parties on the theory that he has the full rights of an agricultural lessee of the land.

In 1915, the Commissioners declared this quarter section valuable for mineral purposes, and adopted a motion segregating the same, and withholding it from sale. And

in 1919 they executed the oil and gas lease to the Magnolia Company that is now in controversy. The lease contained a provision that the Company should be liable to the surface lessee for all damage accruing to the surface interest. This liability the Company has never disputed.

The Supreme Court of Oklahoma held, in substance, that Price had no right either under the Enabling Act or the Oklahoma statutes to require the State to sell the land at any time; and that the action of the Commissioners in withholding the land from sale, segregating the oil and gas, and leasing the same to the Magnolia Company, was in accordance with the provisions of the State statutes, and not in violation of any right vested in Price as an agricultural lessee either under those statutes or under the Enabling Act.

The underlying federal question presented is based upon the contention that under the provisions of the Enabling Act, constituting a trust upon which the public lands were granted to the State, Price, as an agricultural lessee, was vested with the preference right to purchase the land as an entirety and to require the State to sell the entire interest in the same, and that the Oklahoma statutes authorizing the segregation of the oil and gas and the execution of a separate lease thereto, as applied in this case, impaired the value of the fee in the land and deprived Price of his preference right to purchase the land as an entirety, in violation of the due process clause of the Fourteenth Amendment.

We cannot sustain this contention. By § 8 of the Enabling Act it was provided that sections 33 should be apportioned and disposed of "as the legislature . . . may prescribe"; and, further, that where any of the lands granted to the State "are valuable for minerals" they should not be sold before January 1, 1915, but might be leased upon royalty, provided that the mining lessee

should reimburse the agricultural lessee for damage done by the mining operation. This authority to make mining leases clearly applied not merely to the land then known to be valuable for minerals but to such as might thereafter be found to be valuable for such purposes; and it did not require the State to sell such lands at any time, but merely prohibited their sale before the date specified. It impliedly authorized the making of mining and agricultural leases upon the same land. Furthermore § 10, by its specific terms, did not require the State to sell sections 33 at any time, but merely provided that "if sold" they might be appraised and sold at public sale, under such rules and regulations as the State might prescribe, the preference right to purchase at the highest bid being given to the lessee "at the time of such sale."

We think it clear that these provisions of the Enabling Act, read together, gave the State entire discretion as to the time of selling these lands and the extent to which they should be sold. They did not require that all or any part of them should be sold, but merely provided that "if" the State sold them they must be sold in the manner prescribed, and the preference right of purchase be given the lessee in possession at the time of sale. The State was not bound to sell them at any time, or at all, but might retain them as long as it deemed proper, and make meanwhile such leases as it desired not in conflict with the provisions of the Act. There was no provision in the Act, and none is implied, that the agricultural lessee might require the State to sell the land in its entirety whenever he desired to purchase the same; and nothing that gave him any right to purchase the land in its entirety or that prevented the State from executing oil and gas leases, as well as agricultural leases, whenever it deemed this the most advantageous method of realizing the full value of the lands for the public purposes for which they were granted to it. Plainly it was not in-

tended that the mere making of an agricultural lease should put the State at the mercy of the lessee, and require a sale of the land before its value had been ascertained or the available revenue derived from it. In short, the preference right of purchase given the lessee by the Act was merely the preference right of purchasing the land in the condition in which it might be when and if the State chose to sell it; and not a right to compel the State to sell it, either in its entirety or otherwise, whenever he wished to buy.

It results that the Oklahoma statutes under which, as held by the Supreme Court of the State, the Commissioners were authorized to withhold this quarter section from sale and to execute the oil and gas lease to the Magnolia Company, did not impair any right vested in Price as an agricultural lessee by the provisions of the Enabling Act, or deprive him of any right as such lessee in violation of the Fourteenth Amendment.

In so far as the other federal questions presented were in issue under the pleadings or raised in the court below, they are necessarily answered by what we have already said, and need not be considered in detail. They show no error in respect to any federal question. And the judgment is

Affirmed.

PRICE ET AL. v. MAGNOLIA PETROLEUM COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 14. Argued November 13, 14, 1923.—Decided March 2, 1925.

The Oklahoma Enabling Act provided that sections 33 of the public lands, theretofore reserved, should be apportioned and disposed of as the legislature might prescribe; that, where any of the lands granted the State were valuable for minerals, they should not be sold before January 1, 1915, but might be leased for periods not exceeding five years on royalties, providing that agricultural lessees in possession should be reimbursed by the mining lessees for damages done their interests by mining operations; that the lands "if sold" might be appraised and sold at public sale, under such regulations as the State might prescribe, the preference right to purchase at the highest bid being given the lessee "at time of such sale"—*Held*, that an agricultural lessee was not entitled under the act to compel a sale of the land covered by his lease in order that he might purchase it; and that the State was authorized, finding the tract valuable for oil and gas, to execute an oil and gas lease to other parties, subject to the surface rights of the agricultural lessee. Act of June 16, 1906, §§ 8, 10, c. 3335, 34 Stat. 267. P. 421.

86 Okla. 105, affirmed.